# United States Court of Appeals for the Second Circuit



**APPENDIX** 

# N().76-6159

No. 76-6159

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

HELEN D. KELLEY and JOHN E. KELLEY,

PLAINTIFFS-APPELLEES,

v.

UNITED STATES OF AMERICA and RUTH SEMKO,

DEFENDANTS-APPELLANTS.

ATES COURT OF AN

JAN 24 1077

DANIEL FUSARO, CI

SECOND CIRC

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

APPENDIX

PAGINATION AS IN ORIGINAL COPY

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PLAINTIFFS

HUNF, -FRANCIS-A. and SEMKO, RUTH

KELLEY, HELEN D. and KELLEY, JOHN E.

and UNITED STATES OF AMERICA

(Per Memorandum of Judge MacMahon dated 9/18/75)

DEFENDANTS

CAUSE

Petition for removalmotor vehicle

75-CV- 62

#### ATTORNEYS

JameschicksSukkidorancesTork Kryschaddonney BedenadoBûdgok Synaousechrikkid300k

Kramer, Wales & McAvoy 59-61 Court Street P.O. Box 1865 Binghamton, New York 13902 James M. Sullivan, Jr.
U.S. Attorney
Federal Bldg.
Syracuse, New York 13201

Robert C. Powers 46 Vestal Avenue Binghamton, New York 13903 (for Defendant Semko)

1

CHECK _	FILING FEES PAID		STATISTICAL CARDS		
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TATE	VF.	PROCEEDINGS
1975 Feb. 6		Filed Petition for Removal from Supreme Court, State of NY, Broome Co.
" 13	2	to NDNY Filed Notice of Filing of Petition for Removal
" 24		" Note of Issue - May 1975-Auburn-Jury
Mar. 3	4	" Notice of Motion returnable March 10, 1975 at Syracuse and affidavit in support of motion for Order striking Note of Issue
" 10	7	Motion to strike note of Issue. Adjourned to April 14, 1975 at Syrac
April 7		Filed request for admissions of facts Motion to Strike Note of Issue-Off, Note of Issue withdrawn as per letter
Apr. 21	15	Filed Note of Issue for September, 1975 Term of Court & Syracuse-Jury
May 7 May 27	16 17	Filed Request for Admissions of Fact Filed Notice of Motion, returnable June 9, 1975 at Syracuse, Governm Memorandum of Law in Support of Motions
June 9		" Answering affidavit of Robert C. Powers and Exhibit A and B
" 9 June 9	19	"Affidavit in opposition of motion Motion to Dismiss. Motion for Substitution by U. S. ADecision Reserved. Affidavit in opposition to motion filed on 6/9/75 at Uti
July 7	20	by attorneys for plaintiff. Filed affidavit of William J. Stokes
July 7		Filed affidavit of Earl L. Butz
July 31 July 31	23	Filed Brief in Opposition to Motion Filed affidavit of Helen D. Kelley and John E. Kelley Filed Brief in Support of Motion
	E0 (25 H7130 A010) 618	Filed Memorandum of Judge MacMahon (9/18/75) that the United States of America shall be substituted as a defendant in place of Francis A. Hunt, the motion to dismiss the claim is denied.
Dec. 8		Filed Note of Issue for January Term of Court at Utica-Jury
		Filed Interrogatories of United States
Dec.15		Filed Interrogatories of United States to defendant Ruth Semko  **XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
1976 Jan. 5		Filed answer of defendant Semko to Cross-Claim of Defendant United States, and Cross-Claim against Defendant United States
Jan14	31	Filed Answer of Defendant Semko to Interrogatories
Jan.26	32	Filed Answer to Cross-Claim
Feb. 3 Feb. 26 May 4		Filed Answer of Plaintiffs to Interrogatories Filed Note of Issue for May, 1976 Term of Court at Auburn-Jury Filed Stipulation placing this action of the Nonjury Calendar for the May, 1976 Term of Court
May 7 May 7	36 37	Filed Trial Memorandum Filed Proposed Finding of Fact by United States
May 10	38	
May 11	39	Filed Proposed Findings of Fact by defendant Semko
May 11	40	Filed Trial Memorandum
June 1 June 1	41	Filed Bill of Particulars from State Court by plaintiff Filed summons and complaint from State Court by plaintiff
June 1 June 2	42	TRIAL. Witnesses for Plaintiff TRIAL CONTINUED. Witnesses for Plaintiff. Mr. Somerusa moves to stril
June 4		Dr. Testimony on grounds stated-Denied. Witness for Defendant. TRIAL CONTINUED. Judge Port gives his findings of facts and conclusio of law. Judge Port awards \$15,000.00 to plaintiff John Kelly and
June 18	43	\$50,000.00 to plaintiff Helen Kelly. Liability is to be split 50% 5 Filed Plaintiff's Exhibit #15

(-

1976	PROCEEDING8	Judg
	(44) Filed Notice of Taxation of Costs, Memorandum of costs and Disbursements & Affidavit of Donald W. Kramer	
July 22	(45) Filed Order and Judgment of Judge Port (7/21/76) that the plain	tif
	Helen D. Kelley, recover from the defendants the sum of \$50,000.00,	-
	and the plaintiff, John E. Kelley, recover from the defendants the sof \$15,000.00 with interest in each case at the rate of 6% from the	
	date hereof, together with costs of this action and mailed cards re: Judgment to James M. Sullivan, U.S. Attorney and Robert C. Powers,	
Sept. 20	(46) Filed Notice of Appeal of defendant, United States of America	
Oct. 18	(47) Filed Receipt for papers sent to C.C.A.	+
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STATE OF NEW YORK SUPREME COURT : COUNTY OF BROOME

HELEN D. KELLEY AND JOHN E. KELLEY.

Plaintiffs

CO: PLATIT

-vs-

FRANCIS A. HUNT & RUTH SENKO,

Index No.\_\_\_\_

De Condants

Plaintiffs, by their attorneys, Kramer, Wales & McAvoy, complaining of the defendants in the above-entitled action, allege as follows:

AS AND FOR A FIRST, SEPARATE AND INDEPENDENT CAUSE OF ACTION OF THE PLAINTIFF, HELEN D. KELLEY:

- That at all times hereinafter mentioned, the plaintiffs resided and still reside in the County of Broome and State of New York.
- 2. That at all times haveinafter mentioned, upon information and belief, the defendant, Francis A. Hunt, resided and still resides in the County of Broome and State of New York.
- 3. That at all times hereinafter mentioned, upon information and belief, the defendant, Ruth Senko, resided and still resides in the County of Brooms and State of New York.
- 4. That at all times harsinafter mentioned, the plaintiff, Helen D. Kelley, was a lawful pedestrian on Upper Park Avenue in the Town of Binghamton, Broome County, New York.
- 5. That at all times hereinafter mentioned the defendant, Francis A. Hunt, was the operator and owner of a 1966 Oldsmobile bearing New York Registration No. ER3460, hereinafter referred to as the "Hunt" vehicle.

- 6. That at all times hareinafter mentioned, defendant, Ruth Semko, was the operator of an automobile hereinafter referred to as the "Semko" vehicle.
- 7. That at all times hereinafter mentioned, Upper Park
  Avenue was and still is a public highway running in a generally
  northerly-southerly direction within the Town of Binghamton,
  County of Broome and State of New York.
- 3. That on or about November 8, 1972 at approximately 4:00 in the afternoon, the Simko vehicle was so carelessly and negligently operated as to cause a near collision with the Hunt vehicle, the Hunt vehicle was so negligently and carelessly driven as to go out of control, to nearly collide with the Semko vehicle, and to leave the highway, striking the plaintif Helen D. Kelley, and causing her to suffer the personal injurie hereinafter described.
- 2. That the accident described hereinabove was caused solely, wholly and exclusively by and through the negligence of the defendants Ruth Samko and Francis A. Hunt. The plaintiff was in no way responsible therefor and in no way contributed thereto.
- 10. That solely by reason of the carelessness and negligence of the defendants, Ruth Sanko and Francis A. Hunt, the plaintiff sustained serious and permanent injuries and as a result thereof, will suffer permanent disabilities, has been put to great expense, has expended and in the future will expend large sums of money for hospital and medical expenses, has been prevented and will, in the future, be incapacitated from carrying on her usual activities and has suffered great pain and anxiety of mind, all to her damage in the amount of One hundred fifty thousand dollars (\$150,000.00).

FOR A SDCOND, SEPARATE AND DISTINCT CAUSE OF ACTION, THE PLAINTIFF, JOHN E. KELLEY, ALLEGES AS FOLLOWS:

- 11. The plaintiff repeats and re-alleges each and every allegation contained in Paragraphs "1" through "10" of the first cause of action, with the same force and effect as though fully set forth herein.
- 12. That at all times hereinafter mentioned, the plaintiff was and still is the lawful husband of and cohabits with the plaintiff, Helen D. Kelley.
- 13. That as a result of the negligence of the defendants, Ruth Semko and Francis A. Hunt, the plaintiff, John E. Kelley, has been and in the future will be compelled to incur expenses for medical aid and treatment of the said Helen D. Kelley and that this plaintiff has lost and will lose the services, companionship and consortium of the plaintiff, Helen D. Kelley, all to his damage in the amount of fifty thousand dollars (\$50,000.00).

WHEREFORT, the plaintiff, Helen D. Kalley, demands judgment against the defendants, Ruth Semko and Francis A. Hunt, in the sum of one hundred fifty thousand dollars (\$150,000.00) and the plaintiff, John E. Kelley, demands judgment against the defendants, Ruth Semko and Francis A. Hunt in the sum of fifty thousand dollars, together with the costs and disbursements of this action.

DATED: May 21, 1973

KRAMER, WALES & McAVOY Attorneys for Plaintiffs Office & P.O. Address 59-61 Court St. Binghamton, N.Y. 13902 Telephone - 723-6321 STATE OF NEW YORK

SUPREME COURT : COUNTY OF BROOME

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs,

VB.

FRANCIS A. HUNT, and RUTH SEMKO,

Defendants.

ANSWER AND CROSS-CLAIM Index No.

The defendant, Francis A. Hunt, for his answer to the complaint in the above entitled action:

- 1. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs "4" and "12" of the complaint.
- 2. Denies each and every allegation contained in paragraphs "8", "9", "10" and "13" of the complaint.
- 3. With respect to the allegations repeated in paragraph numbered "11" of the plaintiffs' complaint, the defendant, Francis A. Hunt, answers and pleads thereto in the same manner as hereinabove set forth and with the same force and effect as if the same were hereagain stated in full.

AS AND FOR A CROSS-CLAIM AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANT, RUTH SEMKO, THE DEFENDANT, FRANCIS A. HUNT, DEMANDS THAT THE ULTIMATE RIGHTS OF THESE DEFENDANTS, CO-DEFENDANTS IN THIS ACTION, AS BETWEEN THEMSELVES, BE DETERMINED IN THIS ACTION, AND ALLEGES UPON INFORMATION AND BELIEF:

1. If the court or jury finds on the trial of the plaintiffs' causes of action that the defendant, Francis A. Hunt, is guilty of negligence that is the proximate cause of the alleged accident, and that the plaintiff, Helen D. Kelley, is free of any negligence contributing therato and that the defendant, Ruth Semko, was negligent and such negligence was the proximate cause of the injuries to the plaintiff, then and in that event, defendant, Francis A. Hunt, alleges

that there should be an apportionment in this action of the liability between the defendants based upon idemnity as between the defendant, Francis A. Bunt, and the defendant, Ruth Semko.

WHEREFORE, the defendant, Francis A. Hunt, demands judgment dismissing plaintiffs' complaint together with the costs and disbursements of this action; and further demands that if the court or jury finds in the cross-claim that both defendants are liable for the alleged damages, then and in that event, defendant, Francis A. Hunt, requests the court or jury to apportion said damages in accordance with their respective responsibilities.

Dated: Binghamton, New York July 18 , 1973

HINMAN, HOWARD & KATTELL
Attorneys for Defendant, Francis A. Bu
Office and Post Office Address
724 Security Mutual Building
Binghamton, New York 13901
Telephone: (607) 723-5341

IN REPLY RAFER TO: RRSecz

### CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Mr. Brian R. Wright Attorney at Law 59-61 Court Street P.O. Box 1865 Binghamton, N.Y. 13902

Dear Mr. Wright:

Subject: Automobile Accident 11/8/72 Claiman Charles

John E. Kelley; APHIS Driver

Claim-\$150,000.00

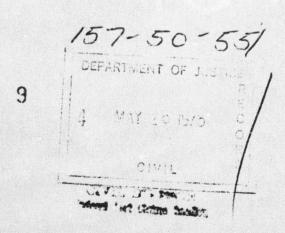
Kelley and Amount of

Reference is made to your clients' claim submitted by you on May 1, 1975 for personal injuries suffered in the above described automobile accident.

Under the Federal Nort Claims Act, as amended, 28 U.S.C. 2671-2680, the Government is liable for personal injuries only when due to the negligence or wrongful act or omission of a Government employee while acting within the scope of his employment. Under 28 U.S.C. 2401(b) a tort claim against the United States shall be forever berned unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Since the accident occurred on November 8, 1972 and your clients' claim was presented on May 1, 1975, your clients' claim is time barred.

Therafore, your clients' claim is denied.



You are advised of your clients' right to file suit against the United States in an appropriate Federal district court within six (6) months of the date of mailing of this letter if you are dissatisfied with this determination.

Sincerely,

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WILLIAM J. STOKES, Acting Director Research and Operations Division UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY, Plaintiffs

CIVIL ACTION NO. 75-CV-62

NOTICE OF MOTION

FRANCIS A. HUNT and RUTH SEMKO,

VS

Defendants

SIRS:

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PLEASE TAKE NOTICE that the annexed Motion to Dismiss will be made on June 9, 1975, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, in the United States District Court, Federal Building, Syracuse, New York.

Dated: May 23, 1975

TO: Honorable Joseph R. Scully Clerk, U. S. District Court Federal Building . Utica, New York 13503

Hinman, Howard & Kattell, Esqs. Security Mutuall Building Binghamton, New York 13901

Kramer, Wales & McAvoy, Esqs. 59-61 Court Street Binghamton, New York 13902 (Attorneys for Plaintings)

Robert C. Powers, Esq. 46 Vestal Avenue Binghamton, New York 13903 (Attorney for Defendant Ruth Semko)

#### MOTION TO DISMISS

The United States of America by its attorney, James M. Sullivan, Jr., United States Attorney for the Northern District of New York, moves this Court for an Order substituting it as defendant in the above captioned action for the reason that plaintiff herein seeks judgment for damages resulting from the allegedly negligent operation of a motor vehicle by defendant Francis A. Hunt, while defendant Hunt was acting within the scope of his employment with the United States of America, and that Title 28 United States Code, Section 2679(b) makes the exclusive remedy against the United States.

The United States of America further moves this Court for an Order dismissing the above captioned case for failure of the plaintiff to file an administrative claim with the appropriate federal agency before beginning a suit as provided for in Title 28, United States Code, Section 2675(a).

JAMES M. SULLIVAN, JR. United States Attorney Federal Bldg., P. O. Eox 1258 Syracuse, New York 13201

By Cosch A Mathews
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY, Plaintiffs

Plaintiffs CIVIL ACTION NO. 75-CV-62

the state of the state of the state of

VS

FRANCIS A. HUNT and RUTH SEMKO, Defendants

> GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT OF MOTIONS

#### STATEMENT

This memorandum of law is submitted in support of Motions by the United States to substitute the United States of America as defendant herein and to dismiss this action as being barred by Title 28, United States Code, §2675(a) for failure to file an administrative claim before bringing suit.

This action was commenced in Supreme Court, County of Broome, State of New York, on or about May 21, 1973 by plaintiffs against defendant Francis A. Hunt and another. On January 29, 1975, the United States Attorney for the Northern District of New York certified that defendant Hunt was an employee of the United States and was acting within the scope of his employment at the time of the accident. Pursuant to Title 28, United States Code, §2679(d), this action was removed to the United States District Court for the Northern District of New York on February 6, 1975.

On April 7, 1975, a Request for Admission of Facts was filed in the United States District Court for the Northern District of New York. The Plaintiffs were asked to admit that no administrative claim had been filed with the United States Department of Agriculture, Animal and Plant Health Inspection Service, the United States Department of Agriculture, or with any federal agency from the time of the incident to the present date (April 4, 1975 at that time). On May 7, 1975, a Reply to Request for Admissions of Facts was received. (See Exhibit A) It stated that an Administrative

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Claim had been filed by plaintiffs with the United States
Department of Agriculture and the United States Department of
Agriculture, Animal and Plant Health Inspection Service. The
Reply did not say when the claims were filed. It was subsequently
learned from the Department of Agriculture that the claim was
first submitted on May 1, 1975.

#### FACTUAL BACKGROUND

This action arises out of a motor vehicle accident which occurred on November 3, 1972 in Broome County which is in the Northern District of New York. The plaintiff, Helen Kelley, a pedestrian was injured when struck by an automobile driven by Francis A. Hunt, an employee of the United States Department of Agriculture. Mr. Hunt, at the time of the accident, was operating his own car with the permission of the federal government while acting within the scope of his employment.

POINT I. AFTER CERTIFICATION AND REMOVAL TO FEDERAL COURT, PLAINTIFF'S EXCLUSIVE REMEDY IS AGAINST THE UNITED STATES OF AMERICA

The Attorney General through his duly appointed delegate, the United States Attorney for the Northern District of New York, has certified that the defendant, Francis A. Hunt, was, at the time of the accident herein, a federal employee and was acting within the scope of his federal employment at that time. Pursuant to this certification, the action was removed, on February 6, 1975, to the United States District Court for the Northern District of New York, by filing a Petition for Removal and by giving notice of such filing.

Title 28, United States Code, Section 2679(b) states that the sole and exclusive remedy for personal injuries caused by a federal employee's negligent operation of a motor vehicle within the scope of his employment will be suit against the United States of America, not the individual employee. This conclusion is abundantly clear from the wording of the statute itself and from

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the congressional intent embodied in the legislative history of this statute. See S.Rep. 736, 87th Cong. 1st Sess. (1961); H.R. Rep. No. 297 87th Cong. 1st Sess. (1961) U.S. Code Cong. & Adm. News (1961) 2784-2787.

Case law is also clear that under 28 U.S.C. §1346(b) and §2679(b) the sole and exclusive remedy from injuries resulting from the conduct of a driver acting within the scope of federal employment is a claim against the United States, and not against the individual employee. This principle is enunciated in Perez v. United States, 218 F.Supp. 571, S.D. N.Y. (1963). See also Hoch v. Carter, 242 F.Supp. 363, S.D. N.Y. (1965); Noga v. United States, 411 F.2d 943 (C.A. 9th Cir., 1969), cert. den. 396 U.S. 841, 90 S. Ct. 104, 24 L.Ed. 92, Gustafson v. Peck, 216 F.Supp. 370 (1963); and Carr v. United States, 422 F.2d 1007 (1970).

POINT II: THE FILING OF AN ADMINISTRATIVE CLAIM IS A CONDITION PRECEDENT TO AN ACTION FOR TORT CLAIM RECOVERY UNDER THE FEDERAL TORT CLAIMS .

Title 28, United States Code, \$2675(a), as amended in 1966 by Public Law 89-506 \$2, 80 Stat. 306, now explicitly provides that an administrative claim is a prerequisite to filing or maintaining a civil action under the Federal Tort Claims Act. The language is clear and unambiguous:

"(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing. . . . "

Congress enacted the 1966 amendment to the Tort Claims Act to provide for increased agency consideration of tort claims and require the exhaustion of administrative remedies prior to suit. Senate Report No. 1327 (Judiciary Committee), 89th Congress, 2nd Session, U. S. Code Cong. and Admin. News, p. 2515 (1966) explains the legislative history of the 1966 amendment was to improve and

expedite disposition of monetary claims against the Government by establishing a system for prelitigation settlement, to enable consideration of claims by the agency having the best information concerning the incident, and to ease court congestion and avoid unnecessary litigation. There can be no question but that the filing of an administrative claim is an absolute prerequisite to maintaining a civil action against the government for damages arising from a tortious occurrence due to the negligence of federal employee. Peterson v. United States, 423 F.2d 363 (3th Cir. 1970); Bialowas v. United States, 443 F.2d 1047 (1971); Avril v. United States, 461 F.2d 1090 (1972); Bernard v. United States Line, Inc., etc., 475 F.2d 1134 (1973) and Hoch v. Carter, 242 P.Supp. 863 (1965).

The requirement of filing an administrative claim is not obviated by the act of suing the government employee in his individual capacity in state court; nor does certification and removal by the Government eliminate the necessity of filing an administrative claim. Neeker v. United States, 435 F.2d 1219 (3th Cir., 1970); Driggers v. United States, 309 F.Supp. 1377 (South Carolina, 1970).

The <u>Driggers</u> case involves removal of an action originally commenced in state court against a government employee. Upon removal the Government moved to dismiss the plaintiff's complaint for failure to file an administrative claim as provided for in 23 U.S.C. §2675(a). In granting the motion to dismiss the Court explicitly rejected the plaintiff's contention that:

"The requirement for an administrative claim to precede a suit does not obtain where suit is filed against an individual whose status as a government employee acting in the course of his employment is not clearly known to the plaintiff." Driggers, at p. 1379

In Mecker, as well, the Court declared when faced with a similar situation that:

"The only question then is whether a claimant will be allowed to circumvent the prerequisite of pursuing his administrative remedies merely by commencing an action in a state court against the individual employee, instead of proceeding initially against the government. We think that the purpose of the 1966 amendment to the Act establishing a statutory scheme

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for initial agency consideration of tort claims on which the United States will be obligated to pay monetary damages cannot be so easily defeated." Meeker at p. 1221

The mere filing of a suit does not meet the requirement of §2675(a) of first presenting a claim to the appropriate agency. Gunstream v. United States, 307 P.Supp. 366 (c.D. Cal. 1969).

A seemingly opposite result was presented in Whistler v.

United States, 252 F.Supp. 913 (N.D. Indiana 1966). Whatever

force the Whistler decision may have had prior to 1966, that

decision is no longer good law as a result of the 1966 amendment

to 23 U.S.C. \$2675(a) as it was based on the prior statute, which

did not mandate prelitigation presentation of a tort claim to an

administrative agency. Neeker at p. 1222, footnote 6. It is

clear, then, that 28 U.S.C. \$2675(a) as amended requires the

filing of an administrative claim as a condition precedent to

an action for tort claim recovery under the Federal Tort Claims

Act.

WHEREPORE deponent prays for an Order (a) substituting the United States of America as defendant herein; (b) dismissing this action against the United States of America; and (c) for such other and further relief as may be just.

JAMES M. SULLIVAN, JR. United States Attorney Northern District of New York

Joseph R. Mathews

Ascistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY AND JOHN E. KELLEY,

PLAINTIFFS

vs.

FRANCIS A. HUNT AND RUTH SEMKO.

DEFENDANTS

Civil Action No. 74-0313

#### AFFIDAVIT

William J. Stokes, Acting Director, Research and Operations Division, in the Office of the General Counsel, United States Department of Agriculture, being duly sworn, deposes and says:

- 1. That he is the Acting Director, Research and Operations Division, Office of the General Counsel, and in this capacity receives investigative reports and administrative claims filed with the United States Department of Agriculture under the Federal Tort Claims Act as a result of accidents and other claims against the United States involving the United States Department of Agriculture.
- 2. That this affidavit is for the purpose of answering certain questions Judge Mac Mahon has concerning the diligent handling of this matter within the Department of Agriculture.
- 3. Attached as Exhibit 1 to this affidavit is a letter from Dr. O.R. Rainors, Mr. Hunt's supervisor, concerning the circumstances under which he was notified of the lawsuit filed in this case.
- 4. Attached hereto as Exhibit 2 to this affidavit is a letter from Mr. Francis A. Hunt stating his reasons as to why he made no request for representation prior to December, 1974.
- 5. Attached hereto as Exhibit 3 is a certified true copy of an unsigned statement of Mrs. Helen D. Kelley, taken by David J. Ricks, former investigator of the Office of the Inspector General (currently known as the Office of Investigation) dated January 19, 1973 at Binghamton, New York.

- 6. Attached as Exhibit 4 is a medical report and a bill for \$3,773.00 from the Binghamton General Hospital which Mr. Ricks obtained from Mr. Kelley on January 19, 1973, when he interviewed Mrs. Kelley at her home.
- 7. This Office became aware of this action on December 9, 1974 by letter from Mr. Sommer, Attorney for the Travelers Insurance Company. At no time prior to this date did Mr. Hunt, our employee, notify this Office of the pending lawsuit.

WILLIAM J. STOKES, Acting Director, Research and Operations Division, Office of the General Counsel, United States Department of Agriculture

Subscribed and sworn to me before me, a Notary Public, in and for the District of Columbia, on this 50% day of June, 1975.

417 Commission Perfers Palarimy 15, 1000

# United States of America

# DEPARTMENT OF AGRICULTURE

#### WASHINGTON

I, EARL L. BUTZ, Secretary of Agriculture of the United States, pursuant to Title 28, United States Code, Section 1733, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

- 1. Letter dated June 15, 1975 to Mr. Saez from Dr. O.R. Rainors.
- Letter dated June 20, 1975 to Mr. Saez from Mr. Francis Hunt, with attached letter dated June 22, 1973 to Mr. Hunt from Mr. T.J. Smith, Assistant
- 3. Copy of an unsigned statement of Mrs. Helen D. Kelley dated January 19, 1973, taken by David J. Ricks, Special Agent, Office of the Inspector General.
- 4. A medical report and bill for \$3,773.00 from the Binghamton General Hospital which Mr. Ricks received from Mr. Kelley when he interviewed Mrs. Kelley on January 19, 1973.

In testimony whereof I have hereunto caused the seal of the Department of Agriculture to be affixed and my name subscribed in the District of Columbia,

this Totalday of frame; 1971

and L. Buty

Secretary

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Office of the

General Counsel



# UNITED STATES DEPARTMENT OF AGRICULTURE

Company and the before the control of the second formation and the second control of the control

6/15/75

MR. R. SAEZ OGC! USDA. REGEARCH & OPERATION DIVISION ROOM 2321 SOUTH BLDG. WASHINGTON, D.C. 20250

Dear Sir.

Phone request by Kerry Kelzemberg Mpls. NINN. HEREWITH ANSWERED AS FOUNDS: During the winter month and early oping 1973 Thave met FA. HUNTON his Job. + remember that Tlearned from F. A. Hunt Hat he has been Visiting Hellen Kelley while the was wispifalized bewas informing me that there was no lawouit to expect that tellen Kelling was felling him that he F.A. Hunt was not guilty.

Tolo not remember questioning F.A. Hunt after that.

Next Trensule that Two informed about defended by U.S. Govm., Treceived a copy of

21 the request Dafed Dec. 21,74 addressed \$ Dr. 44. Farber my Supervisor in alea office Harristurg, Va. on O.R. Samor Ch.

Rufino Saez, Esq. "Office of the Gener. Counsel U.S. Dept. of Agriculture Washington, D.C. 20250

Dear Mr. Saez ,

As I explained to you, in our phone conversation of June 19,1975 , the reporting procedure that I ensued was as follows. Subsequent to the accident of Nov.8,1972 I contacted Dr. O. Rainors my circuit supervisor by phone at his residence and explained to him what had happened, regarding the accident. He assured me that things would be alright, and that he would meet with me at the earliest possible time to review the necessary

reports needed to be submitted by me.

The following day I went with my wife to the hospital to express my regrets for the incident. While there, we met with Mr. Kelley and the four of us briefly discussed the accident, Mrs Kelley thanked me for what she said was a good job in my trying to avoid hitting her. At this time I explained to them that I worked for the U.S.D.A. and that there should be no problems as I was on my way home from an assignment at the time and for them to keep in touch with me. A flew day's later I met with Dr. Rainors to complete the necessary forms at which time I told him about the meeting and what had been said, he advised me to complete the necessary reports and submit them to him immediately. Also to contact him if there were any now developments. At various times in the week's following the accident I met with Dr. Rainors & Dr. Krivickas during there routine visits with me, during these visits I continued to tell them that I had not heard of any developments in the matter. A short time later Dr. Rainors called and . instructed me to meet with a representative of the O.I.G. which I did. This agent questioned me at length about the accident. He returned a fiew day's later and told me that he had conducted a thorough investigation of the accident and had talked to all partys involved, including Mr. Koons of the Travelers Ins. I told the agent that he was very disturbed with the fact that I had visited Mrs. Kelley and that I was not to do so again and to refer all persons and material to his office, the agent did not instruct me to do any different.

Unable to obtain information that appeared to me, to be relevant, I continued to tell my supervisors that there was to the best of my knowledge no new developments. Eventually I was instructed by Mr. Koons to contact a Mr. Sommer, in meeting with him I again explained my position. He assured me that everything was being done the way it was supposed to be. It was not until? Mr. Sommer offered me the ultimatum of whether I wanted Travelers to make an offer to Mrs. Kelley or not, that I told him the government should be in on that , and persuaded him to investigate through my superior In doing so he later advised me that the case should never have been handled the way it was and that he would take immediate action to correctit

Unfortunately it may appear that I was ignorant in my reporting but I was only able to forward what I could understand about it all.

I am enclosing a copy of a letter which I received from Travelers

22

Francis Hunt 63

Very truly yours,

cc: Dr. O. Rainors

THE TRAVELERS INSURANCE COMPANY THE TRAVELERS INDEMNITY COMPANY

CLAIM DEPARTMENT
T. J. SMITH, ASSISTANT MANAGER

June 22, 1973

BINGHAMTON AGENCY OFFICE
92 Hawley Street
BINGHAMTON, New York 13901
Telephone: 772-1130

Mr. Francis A. Hunt Ely Park, Bldg. \$55, Apt. #4 Binghamton, New York

> RE: 410-AB-5426259 Francis A. Hunt re: Helen Kelly acc: 11/8/72

Dear Mr. Hunt:

This will acknowledge receipt of suit papers served on you on June 13, 1973 in an action brought in Broome County Supreme Court, by Helen D. Kelley and John E. Kelley.

We have referred the defense of this action to the law firm of Hinman, Howard & Kattell, Security Mutual Building, Binghamton. The circumstances of this matter should not be discussed with anyone except an authorized representative from the Travelers Insurance Company or from our attorneys office.

I note that the amount demanded in the suit of \$150,000.00 is in excess of your bodily injury limits of \$10,000.00 per injury and \$20,000.00 per accident. Under the circumstances you may wish to retain your own attorney for representation in reference to the excess amount but this is not a request nor a requirement of the Travelers Insurance Company and we only bring it to your attention for your own protection.

Very truly yours,

23

Assistant Manager

TJS/skg

BINGHAMTON, NY

I, HELEN D. KELLEY, MIKE THE FOLLOWING STATEMENT PREELY AND VOLUNTARILY TO PAVID S. RICKS, WHO HAS IDENTIFIED HIMSELF TO ME AS A SPECIAL AGENT OF THE DEFICE OF THE INSPECTOR SCHIEBL, UNITED STATES DEPARTMENT OF AGRICULTURE BYOWING THAT THIS STATEMENT MAY BE USED IN EVIDENCE. 1 RESIDE AT RDZ, BINGAMMTON, NEW YORK, ON NOVEMBER 8, 1972, AT ABOUT 4:20 PM, 1. WAS WALKING SOUTH ON THE EAST SHOULDER OF UPPER PARK AVENUE, BINGHAMTON, NEW YORK, IN FRONT OF THE WOSBURG HOUSE. IT WAS RAINING, BUT VISIBILITY WAS STILL PRETTY GOOD. I MAS JUST ABOUT TO REACH THE CREST OF THE HILL, NEAR THE VOSBURS HOUSE, STILL A DISTANCE FROM THE VOSBURS MAILBOX, I PON'T KNOW EXECTLY HOW FAR I WAS FROM THE MAILBOX. SAW A CAR AFFRONCHING FROM THE SOUTH, IT WAS IN ITS OWN LANG. IT SWEEVED TO THE RIGHT, ONTO THE SHOUDER WHERE I WAS WALKING, THEN IT SWEEVED TO AVOID ME, IT WAS A MICACLE THAT IT PIDU'T HIT ME PIRECTLY-ONLY THE DRIVER'S QUICK REACTIONS Stuep Me.

I AM SURE THAT THE ACCIDENT WAS THE FAULT OF THE DRIVER OF THE SECOND CAR, WHICH WAS HEADLUS SOUTH. THE CAR THAT HIT ME WAS DEFINITELY IN ITS OWN LANG, BUT HAD TO AVOID THE SECOND CAR BY SWERVING ONTO THE SHOULDER, SECOND CAR MUST HAVE BEEN IN THE MIDDLE OF THE ROAD, MANY DRIVERS POUT REALIZE HOW NARROW THE ROAD 13 THERE. THERE SHOULD BE A YELLOW LINE, OR A SIGN, SO PRIVERS WILL STAY IN THEIR LANES, AT THE TIME OF THE ACCIDENT IT WAS STILL LIGHT OUT, NOT REALLY DUSK. I WAS WEARING A MEDIUM BLUE RANCOTT AND LIGHT THN SLACKS. IF THE CREST OF THE HILL WERE NOT SO STEEP, I WOULD HAVE BEEN CLEARLY VISIBLE. I DON'T KNOW IF THE CARS HAD THEIR 2-19 HTS ON. I AM SURE THAT THE SOUTHBUILD CAR PORCED THE CHR THAT HIT ME OFF THE ROAD. I SAW THE CHR THAT HIT ME, IN ITS OWN LINE, BUT THEN IT HAD TO MOVE EVEN FARTHER TO THE RIGHT TO ANDID THE OTHER CAR I HAVE READ THE HOUSE TWO-PAGE HAND PRINTED STATE. MENT AND IT IS TRUE AND CORRECT. I HAVE BEEN GIVEN AN OPPORTUNITY TO MIKE ANY CHANGES OR ADDITIONS AND I HAVE SIGNED OR WITHLIED EACH PAGE.

2

MRS. KELLEYN ADVISED THAT THE ABOVE STATEMENT IS TRUE AND CORRECT. SHE SAID SHE WOULD BE GLAD TO SIGN THE STATEMENT, BUT SHE WOULD LIKE TO TALK TO HER LAWYER FIRST. David Juich Kicks

0-11737

11/13/72

A. Corperter

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MERCRIAL 631

POSTGYERATIVE DIACHOSHS:

1. Open comminuted fracture of previous and of the right forum the the subtrochouserie region.

2. Repture of the lateral collateral ligaments with ... availation 66 the proximal end of the fibula, left knee.

3. Bupture of the posturior capsule and posterior cruciate ligarant, left knee.

1. Right femir, upon communited fracture of the shaft of the femir in the subtruchanteric region.

2. Replace of the lateral collected lighters with availation of proximal and of the last fitule. Tear of the lateral trade are.

3. Papture of the perterior equator lipearer and the perterior capalle of the left hace.

- 1. Papair of the lateral collateral ligoment, lock know, with wire secure of the proximal end of the fibule to the whate- of the fibule,
- 2. Removal of torn interpl semisous.
- Repair of copede, posterior, of the left knee (the posterior exactste ligament was not repaired.

The last lower extremity was propped and under a courniquet a lazy-S incision was rade over the lateral aspect of the knee extending down over the head of the fibule? Irradistaly on making the cut, we entered the term pertiodef the lateral collaceral lightent and there was a good fragrent of the head of the fibule displaced up to the level of the joint. The joint was opened, and a tear was found in the lateralismissue. The lateral meniacus con then removad. The posterior emeiate ligament was found to be torn as well as the posterior copule of the knee joint. Sucures we placed in the posterior capsula of the base joint, and then wire auture was placed up around the head of the fibula and transversely through a hole deliled in the preximal and of the chief of the tible. The knee was then reduced. It was irrigated and then reduced. Slight values position with Cleaton of the know at 20 depress. Then the seture of the pescertor espeule was tightomed and secured. The wire enture within the Internal collateral ligament and the aguland portion of the proximationed of the flighte in position was tightened with the wire tighterers and then a knot was made in the heavy 15 gauge stainless steel sire. Then this was completed, the lace was very stable. The tissues were closed using 99 beyon subsuspencially and constitutions 4-4) monofilment hylon in the skin. Dry dressing was equited, and then a long log coat was applied extending from the great to the tip of the there. I is teld the rune in 30 degrees flexion and in slight values. Then the region of the kain and accordant and of the proximal half of the right fibrile was propost, and a herry dulinous pla was insected transversely through the regions the

REPORT OF OPERATIONS P.2 KELLEY, HELEN

TECTIQUE Cone'd:

tibial tubercle. A was applied to this and then patient was placed back in traction as she had been before the procedure, but at that time she was in skin traction instead of skaletal traction. Condition of patient was good throughout the procedure.

/jek Dictard BY: A.R. CARPENTER, M.D. Trons:11/17/72
cc: Dr. C. Garpenter
Dr. Woodruf:

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RECEIVED JUL 30 1975 SYRACUSE N. X.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs,

-v-

CIVIL ACTION No. 75-CV-62

FRANCIS A. HUNT and RUTH SEMKO,

Defendants.

## BRIEF IN OPPOSITION TO MOTION

## STATEMENT

The above entitled action was originally begun in the Supreme Court of the State of New York in Broome County on May 21, 1973 involving an automobile accident which happened in the County of Broome, New York State, October 8, 1972 involving an automobile owned and operated by Francis A. Hunt and an automobile owned and operated by the defendant Ruth Semko. Pre-trial proceedings were conducted in the State Court and the case appeared on the Trial Calendar and was actually called for trial in December, 1974, at which time the attorneys for the defendant, Francis Hunt, Hinman, Howard & Kattell, representing the Travelers Insurance Company, the insurer of the Hunt vehicle, informed the court that the case had to be held pending removal to Federal Court because Francis

Hunt was an employee of the Federal Government engaged in the course of his employment at the time of the accident. Thereafter and on February 11, 1975 the United States attorney for the Northern District of New York under the authority of Section 1629 U.S.C.A. caused the action to be removed from the District Court of the United States in the Northern District of New York. Thereafter by Motion returnable on June 9, 1975 the United States attorney moved this Court for an Order substituting the United States of America as defendant in the place and stead of Francis A. Hunt in the above entitled matter and for an Order dismissing the plaintiff's Complaint for failure to file an administrative claim as required by Title 28 U.S.C.A. Section 2675 as amended in 1966 thereby raising the question to be decided upon this Motion.

# FACTS

On November 8, 1972 at about 4:30 in the afternoon the plaintiff Helen D. Kelley was a pedestrian walking in a southerly direction along the public highway in the Town of Binghamton, Broome County, New York. At that time a private passenger automobile owned and operated by the defendant Francis A. Hunt was proceeding in a northerly direction on the same highway and a vehicle owned and operated by the defendant, Ruth Semko was proceeding in a southerly direction. As these cars approached each other, the vehicle driven by Francis A. Hunt skidded along the right side of the road, into the right hand ditch, striking and

injuring the plaintiff, Helen D. Kelley. At the time of the accident Ru h Semko was returning home from her employment in Binghamton and Francis A. Hunt was proceeding to his home in Binghamton. There are no indicia of any kind associated with the accident or the people in it which indicated employment of Francis Hunt by the United States Government or that the United States Government in any way could be involved as a responsible person for the occurrence of the accident and its results.

Since this Motion was made the attorneys for the plaintiffs, Helen Kelley and John Kelley, have been informed for the first time that the Department of Agriculture of the United States through one David J. Ricks investigated this accident and conferred with the defendant Ruth Semko and took a statement from her at the offices of Robert C. Powers, the attorneys for Ruth Semko on January 30, 1973. The Department of Agriculture admits being informed that the plaintiffs were represented by counsel but did not communicate with counsel or provide any information to plaintiff's counsel in respect to the interest of the Federal Government in the matter.

We now have letters from the defendant Francis Hunt and Dr. Rainors which have been supplied by the Government to explain the reporting process which has been followed. Both Mr. Hunt and

Dr. Rainors acknowledge an immediate report by Mr. Hunt of the occurrence to Dr. Rainors. Apparently they discussed the question of a lawsuit because Dr. Rainors said Hunt told him there was no lawsuit expected, and Hunt agrees that Dr. Rainors told him to report any new developments.

Thereafter, as indicated by Mr. Hunt's letter and the letter of the Travelers Insurance Company dated June 22, 1973 attached to it, Mr. Hunt was sued for \$150,000.00 and had only a \$10,000.00 insurance policy for his protection. Although he knew he was to report developments to his superior, he did not report the occurrence of this lawsuit in June of 1973, or thereafter, until December 1974.

It further appears that an agent representing the Government talked with Mr. Hunt and with a Mr. Koons of the Travelers
Insurance Company which insured Mr. Hunt. It is therefore clear that the representatives of the Travelers Insurance Company knew that Mr. Hunt was a Government employee and the facts with respect to his particular employment admission at the time of the accident. With this knowledge, Travelers Insurance Company referred Mr. Hunt to its attorneys, Hinman, Howard & Kattell, knowing that the matter involved a claim against the United States Government rather than Mr. Hunt individually. It will be noted

again that Mr. Koons of the Travelers Insurance Company directed Mr. Hunt to Mr. Sommer of the firm of Hinman, Howard & Kattell. From Mr. Hunt's letter it would appear that he explained to Mr. Koons and to Mr. Sommer the fact of his employment at that time, and was told to do nothing.

Next we have a complete contradiction of terms as to the manner in which the Government became involved in the defense of this matter. Mr. Hunt's letter said Mr. Sommer had offered him an ultimatum as to whether Travelers should make an offer to Mrs. Kelley or not and then he told Mr. Sommer about the Government being in on it. Mr. Sommer writes that in December 1974 he discussed with Francis Hunt the possibility of a Judgment against him in excess of his policy and Mr. Hunt told him the Federal Government would pay any excess Judgment, and that he, Mr. Sommer, then called, at. Mr. Hunt's request, a lawyer named David Spader in the office of the General Counsel of the United States Department of Agriculture. However, in the letter to Mr. Brian Wright dated December 9, 1974 Mr. Sommer said the request for defense of Mr. Hunt by the Government was made in response to a telegram from Mr. Merwin Kaye.

It is respectfully submitted that the papers submitted by the Government fail to disclose any valid reason for the failure of

Francis Hunt to turn over copies of the process in the action to his superior, Dr. Rainors. Certainly, a lawsuit for \$140,000.00 in excess of his insurance policy was a new development in the case. It is further submitted that the admitted contacts between the Travelers Insurance Company and the agencies of the Department of Agriculture involved in this case raise a justified suspicion that the papers were deliberately withheld from the Government by the Travelers Insurance Company in an effort to gain the benefit of the two year Statute of Limitations.

In the light of all of the materials submitted by the Government in connection with the Affidavit of William J. Stokes, verified the 30th day of June, 1975, we have prepared and submit herewith further Affidavits verified by the plaintiffs, Helen D. Kelley and John E. Kelley with respect to the statements of Mr. Hunt and the reported statements of Mr. Ricks.

The Affidavit of Gustave DiBianco, Assistant United States
Attorney, verified February 28, 1975, indicates that knowledge of
the existence of the action in the State Court and of the claim,
first came to the attention of the United States Attorney's Office
in December, 1974. The plaintiff's knowledge of the involvement
of the Federal Government in this matter came in the form of a
letter dated December 10, 1974 and a prior conversation with

Mr. Theodore Sommer referred to in that letter. Mr. Sommer's letter enclosed a copy of his letter to James M. Sullivan, the United States Attorney for the Northern District of New York. Copies of these documents are hereto attached and are marked Exhibits "A" and "B" respectively.

On or about May 21, 1973 actions were begun in the Supreme

Court in the State of New York for Broome County against the defendants named in this action seeking damages on behalf of the plaintiffs for the injuries sustained in the above mentioned accident. The Summons and Complaint was served personally on

Francis A. Hunt who was obligated pursuant to the U. S. C. A.

Title 23 Section 2679 (c) to deliver such Summons and Complaint to his immediate superior or to the designated person in the Department of Agriculture who in turn was required to provide copies of such papers to deny the State's Attorney for the Northern District of New York. On occurrence of these events it was the obligation of the United States Attorney to certify, if such were the fact, that Francis A. Hunt was acting at the time and place of the accident in the course of his employment for the Department of Agriculture and to remove the case to the Federal Court.

At the time these proceedings began the case was called for trial in the Supreme Court, Broome County and the trial was about

to begin. Had the Supreme Court of New York State proceeded with the trial, there having been then no Petition to transfer the case to Federal Jurisdiction, Federal Jurisdiction would not have existed. Even at that time there was no certainty that the United States Attorney would certify the employment of Francis A. Hunt so as to make the transfer to the Federal Court an appropriate proceeding. In fact the Affidavit of Gustave J. DiBianco, verified February 28, 1974 states:

"It was not until late January, 1975, that enough information was obtained in order to certify this employee as within the scope of his employment".

This then becomes a case in which Helen Kelley, a pedestrian-(continued on page 9) housewife has been required by the Federal Law to have acquired knowledge of the existence of a remedy, the propriety of which was not known to the Federal Government itself until late in January, 1975, two years and two months after the occurrence.

Following this belated recognition by the United States that the plaintiff's claim might appropriately be made against it, the plaintiffs, through their attorneys, on May 1, 1975 forwarded an administrative claim to the Department of Agriculture which was denied in a letter received from the Department of Agriculture on May 16, 1975. Six months have not elapsed since the denial of that claim.

#### POINT I

THE PLAINTIFFS' ACTION AGAINST FRANCIS A. HUNT OR AGAINST THE UNITED STATES OF AMERICA, IF THE UNITED STATES IS SUBSTITUTED FOR FRANCIS A. HUNT IN THIS ACTION, IS NOT BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS, THE UNITED STATES CODE ANNOTATED TITLE 28 SECTION 2401 (b).

exclusive jurisdiction was given to the District Courts

over claims against the United States for money damages caused by

the negligent or wrongful act or omission of any employee of the

government while acting within the scope of his employment under

the circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the

place where the act or omission occurred by Section 1346 (2) (b)

of the United States Code which provides as follows:

"Subject to the provisions of chapter 171 of this title (SS2671-2680 of this title), the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have ... exclusive jurisdiction of civil action on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

It is significant that the jurisdiction of the District Court is subject only to Sections 2671-2680 of title 28 and that there is no reference to Section 2401 which is the section containing the Statute of Limitations in actions against the United States generally. Consequently, Section 2401 has no application to those cases in actions which have been originally instituted against the employee of the United States rather than against the United States itself. In such a case the United States becomes liable under circumstances where the United States if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The above entitled action was begun in the Supreme Court of the State of New York well within the statutory period for the commencement of such an action against the individual wrongdoer. The exclusive jurisdiction of the United States District Court/ subject to those rights which the claimant had against the employee involved

in the accident including all liability created by the timely commencement of the action in the Court having jurisdiction of the proceeding if it were against the private person, the Government employee, whose omission caused the injury giving rise to the action. In other words the Statute of Limitations in the jurisdiction in which the accident occurred governs those cases in which the employee is the original defendant.

This conclusion is strengthened by reference to Section 2671 to 2680 of Title 28. Section 274 of Title 28 repeats in part the language of Section 1346 (2) (b) providing as follows:

"The United States shall be liable, respecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Section 2675 of Title 28 would be entirely superfluous if provisions of Section 2401 (b) was\_to\_be applied to cases where the claim against the United States arises because the United States is substituted for its employee as the responsible party following a certification by the Attorney General. Section 2675 (a) provides as follows:

"An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented

the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing sent by certified or registered mail. Failure of an Agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant anytime thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure (Rules, Part 1) by a third-party complaint, cross-claim, or counterclaim."

This Section is entirely unnecessary insofar as it refers to the direct claim against the United States if Section 2401 (b) is to apply in those cases in which the original action is brought against the Government employee individually and not against the United States. Section 2401 (b) in itself would require the filing of a claim prior to the institution of an action and the institution of the action within two years or within six months of the denial of the claim. This new requirement in Section 2675 requiring the filing of a claim in those cases in which the United States is liable only as a substituted party for its negligent employee merely requires the filing and disposition of the claim before action is brought and does not impose any other Statute of Limitations such as that contained in 2401 (b). Under these circumstances it becomes obvious that the claim against the Federal Government as the substitute for its employee, the original defendant in the action, may be filed after the Federal Government has certified existence of the employment that the employee was acting within the scope of his employment as required by Section 2679 (b)

of Title 28 of the U. S. C. A. The applicable general Statute of Limitations then becomes the Statute of Limitations applicable at the time and place where the incident occurred giving rise to the action in State Court against the government employee directly involved. Only in this way can the United States fulfill the obligation which it has undertaken in Sections 1436 and 2674 to assume the liability of its employee to the full extent to which the employee as a private person may have been liable.

The applicable statute in the State of New York which limits the time for bringing an action for damages arising from the accident occurring on November 8, 1972 is three years, Civil Practice Law and Rules, Section 214. This time will not expire until November 7, 1975. As indicated above, the plaintiffs, having been advised by the act of the United States Attorney that the defendant Francis A. Hunt was an employee of the United States acting within the scope of its employment at the time of the accident, have now filed a claim with the appropriate Federal agency, which has been denied, and have until November 7, 1975 to begin an action directly against the United States of America in which the claim filed by the claimant and its denial may be alleged. If one were to apply Section 2401 of the United States Code requiring that action must begin within six months after this denial the plaintiffs still have six months from May 15, 1975 within which to begin their action directly against the United States, and that would bring the final date to November 15, 1975.

From the foregoing it is apparent that the Court might dismiss the pending action as premature because no claim had been filed against the appropriate agency as required by Section 2675 Title 28 prior to the commencement of the action in the State Court or prior to the transfer of the action to Federal Court at the Motion of the United States Attorney. If that is done and the law applies as we have sought to have it applied, the plaintiffs may immediately begin a new action in Federal Court directly against the United States for the same relief. However, we are faced with an action in which there are cross-claims asserted by Francis A. Hunt, defendant against Ruth Semko, and by Ruth Semko against Francis A. Hunt in which Francis Hunt seeks indemnity from Ruth Semko for any damages he may be required to pay and Ruth Semko seeks indemnity from Francis Hunt for any danages which she may be required to pay. U. S. C. A. Title 26, Section 2675 (a) requiring the filing of claims specifically states as follows:

> "The provisions of this subsection shall not apply to such claims as may be asserted under the Federal rules of Civil Procedure (Rules, Part 1) by a third-party complaint, cross-claim, or counter-claim."

The dismissal requested by the Government would result in the remand of the case against Ruth Semko in the Supreme Court, Broome County where she would be required to try it without being able to assert her cross-claim against Francis A. Hunt and such a result was never intended and would be a perversion of justice.

It seems, therefore, since the action of the plaintiff is

not time barred and, since there has been an administrative claim filed and denied, the Court should, in the interest of justice and the efficient use of court processes, grant the Motion to substitute the United States as the party defendant and deny the Motion to dismiss on the condition that the plaintiffs file an amended Complaint alleging the filing of claim with the Department of Agriculture and the denial of the claim. The case would then be before the court in proper posture with the crossclaims of the parties intact. The alternative would be to dismiss the plaintiffs' Complaint as premature which would result in the immediate filing of a direct action against the Government alleging the same facts and in which the same question of the Statute of Limitations would be involved.

In the only cases which are closely analogous to the present case, the courts have refused Motions similar to that involved here. In Menderson v. United States, 429 F 2nd 588 (U. S. Court of Appeals 10th Circ.) decided July 23, 1970, the accident occurred on December 3, 1966 approximately a month before the effective date of the Amendments adopted by Congress on July 18, 1966. Action was begun in the District Court of Oklahoma County against Roberta Jean Price on November 30, 1968. On January 30, 1969 the United States Attorney removed the case to Federal Court certifying that the defendant was in the course of her employment for the United States. Thereafter the actions were dismissed as to the defendant Price and the United States Government substituted. The United States then moved for dismissal of

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the case against the United States. The Court upheld the Decision of the lower court denying the Motion to dismiss, saying at page 590:

"The Federal Court having found that Price was acting within the scope of her employment at the time of the accident, the only cause of action that existed was against the United States. In this situation the United States became a party as a matter of law when the action was filed in the State Court, regardless of when it was formally substituted as a party defendant. (Citing cases)".

The same situation arose in Whistler v. United States, 252 F Supp. 913 (1966) where the Court said at page 917:

"(5) The plaintiff filed an action which, under all the facts established or alleged at the time of filing, she had a right to file in the state court. That action was brought within the two-year statute of limitations for federal tort claims, although the plaintiff at that time was not alleging a federal tort claim. Subsequently, the United States of America itself raised for the first time the question of the applicability of the Federal Tort Claims Act and conceded that the named individual defendant was in fact a federal employee acting within the scope of his employment. United States then removed the case to the federal court as a federal tort claim and substituted itself as the defendant, as it was required to do under 28 U.S.C. 8 2679. The plaintiff acquiesced in all of this and accepted the new defendant's concession of agency between itself and the original defendant. The case is now at issue in the forum and in the manner contemplated by

Congress. It is irrelevant that the United States did not remove the case until after the two-year period had expired. The test under the statute of limitations here involved is whether the suit against the appropriate in lividual federal employee was brought within the two-year period in a court having jurisdiction of the action unless and until it is removed by the Government pursuant to the Federal Tort Claims Act.

Accordingly, the defendant's motions to dismiss, for summary judgment, or, in the alternative, to remand are all denied."

The interpretation of the Statute required in this case was clearly indicated in Reynaud v. United States, 259 F. Supp. 945 (W. D. Mis. decided October 23, 1966). There an accident happened on March 7, 1963 and no action was begun in the State Court or Federal Court until May 21, 1966, more than three years after the accident. Since no action was begun in any court until after the Statute of Limitations had run, the case was dismissed. The Court said at page 946:

"Title 28, U. S. C., paragraph 2679, puts the affirmative burden on the government in such case as this to step in and defend the action when such Civil Action is brought against the government employee. The records show that the Government did not delay in entering the case when it was filed. Had the case been filed within the two year period, it could not be dismissed as untimely even if the certification and removal were made outside the period, Whistler v. United States, 252 F.

Supp. 913 (N. D. Ind. 1966)."

In all of the cases decided since the 1966 Amendments to the United States Code became effective, actions brought in the State Court or United States Court before the filing of the required administrative claim had been dismissed is premature. However, in no case in which the action was brought in the State Court within the two year period has the effect of the dismissal been to terminate the litigation because of the Statute of Limitations. In each case there remained time before the expiration of the Statute within which the administrative claim could be filed and action begun upon its denial. For example, in Driggers v. United States, 309 F. Supp. 1377 (District Court S. Georgia, 1970) the accident happened on April 21, 1969. Action was begun in the State Court on April 23, 1969. The United States Attorney moved the case to Federal Court so rapidly that the Decision was handed down on March 19, 1970, less than one year after the accident and well within the two year period for filing claims, if that were to apply. Beavers v. U. S., 291 F. Supp. 856 was an a:tion directly against the United States in which no administrative claim had been filed and the question of removal from State Court was not involved. However, even in that case the cause of action arose on June 16, 1967 and the dismissal occurred

on October 30, 1968 on the ground that the action was premature. There remained ample time for filing a claim within the two year period. In Staley v. United States, 306 F. Supp. 522, the claim is directly against the United States. The cause of action accrued on October 3, 1963 and the Decision dismissing the claim as premature for failure to file an administrative claim was rendered in 1969, again well within the two year period for the filing of the administrative claim. In Meeker v. U. S., 435 F. 2nd 1219 (8 Circ. 1970) suit in the State Court was instituted on December 17, 1969 and on December 31, 1969 the United States Attorney had the case removed to Federal Court. Plaintiff was aware that the Federal Government was involved because the accident involved a collision with a postal truck. Suit was begun in the State Court one day short of two years following the accident. Even then the Court dismissed the action as premature because no administrative claim had been filed and did not pass on the application of U. S. C. Title 28, Section 2401.

In Carr v. United States, 422 Fed 2nd 1007 an accident happened in December (on December 8, 1965) involving a collision between two cars, each operated by Government employees, obviously in the course of their employment. The action was commenced in the State Court on March 6, 1963, over two years after the accident. It was removed to Federal Court and dismissed. In this case

the accident involved two Federal employees, each of whom was engaged in the course of his employment and known to be a Federal Emplyee engaged in such employment. The action was instituted after the two year Statute had expired and in the State Court solely in an effort to avoid the restriction in the recovery of the plaintiff to that to which he was entitled under the Federal Employee's Compensation Act. The claim against the United States was lost because of the availability of relief (continued on page 21)

under the Federal Employee's Compensation Act and there could have been under no circumstances a valid claim against the United States if the defendant employee was acting within the scope of his employment. The Statute of Limitations problem was purely incidental.

In <u>Hock v. Carter</u>, 242 F Supp. 863 (S. D. N. Y. 1965) the plaintiff infant brought an action in the State Court against the owner of a school bus which was involved in an accident. There was no proceeding in any court against the Government or its employee until more than two years after the accident. At that time the plaintiff learned that a United States Post Office truck was involved in the accident and made the driver of that truck an additional defendant in the action in the State Court, this action being begun more than two years after the initial accident. At no time was there any administrative claim filed.

The case was determined principally on the question whether infancy was a disability under the circumstances which would toll the running of the Statute of Limitations in the action against the Government, and the Court held that the Statute was not tolled by infancy, citing the Federal Statute. It will be noted that from the inception of the action against the Government employee the responsibility of the Government was apparent from the identity of the vehicle involved in the accident and the action against the employee was purely an effort to avoid the effect of the Statute of Limitations.

In Perez v. U. S., 218 F Supp. 573 (1963 S. D. N. Y.), there was a collision between the plaintiff's car and a postal truck driven by the individual defendant. The action was brought in United States District Court initially against both the United States and the individual employee. The action was dismissed against the employee on the ground that the United States had assumed complete responsibility for any damages and that that remedy was inclusive.

Similar in effect are Noga v. U. S., 411 F 2nd 943 and Gustafson v. Peck, 216 F Supp. 370.

In the following cases an action was brought directly against the United States and they merely hold that the filing of an administrative claim is necessary prior to the institution of an action against the United States. The question of the Statute of Limitations was not involved in any of these cases. Peterson v. United States, 423 2nd 368 (3th Circ. 1970); Bialowas v. United States, 443 F 2nd 1047 (1971); Avril v. United States, 461 F 2nd 1090 (1972) and Bernard v. United States Lines, Inc. etc., 475 F 2nd 1134 (1973); Gunstream v. U. S., 307 F Supp. 366 (C. D. Cal. 1969).

## POINT II

THE UNITED STATES HAS WAIVED ITS RIGHT TO BE SUBSTITUTED AS DEFENDANT AND IS ESTOPPED FROM CLAIMING THAT RIGHT.

In the present case the accident from which the cause of action arises was one which on its face had no relationship to any Government activity or Government employee. It involves a pedestrian and two privately owned vehicles operated by private individuals neither of whom had any indication that either might be involved in Government activity or might be an employee of the Government. The accident erpots did not indicate any relationship to any Government activity. Consequently, the matter was to all appearances a matter for trial and decision in the court of (continued on page 22-b)

the State of New York between the individuals involved and their insurance companies, if any. Under these circumstances the appropriate procedure is to pursue those individuals who as owners or operators of the vehicle may be liable. That an accident of this type may on rare occasions involve individuals who are employees of the Federal Government and who may at the time of their accident be engaged in the business of the Government is not a sufficient basis to require the injured person or persons to conduct an investigation of the activities of the Federal Government and assume the risk of losing their remedy because of failure to make such an investigation or failure to reach the right conclusion as a result of it.

The purpose of the "driver's act", U. S. C. A. 1346 (2) (b) by which the United States assumed liability for the acts and omissions of its employees while engaged in the business of the Government was to afford protection to the employees and provide a means by which proper monetary damages could be paid to those injured by negligence of Government employees in the course of their employment. It was not intended as a vehicle by which both the negligent employee and Government would avoid just liability for injuries and death by concealing facts and hiding behind statutes, the application of which would in the normal course of events be unknown to the injured party.

It is submitted that Congress recognized this in the enactment of the sections of the United States Code which are involved here. They recognized actions would be brought in the state

courts against Government employees engaged in the operation of their own vehicles and apparently on private business. This is apparent in the provisions of the United States Code 2679 (c) by which the employee who is a defendant in a civil action is required to deliver all processes served upon him or a copy to his immediate superior and such person is required promptly to furnish copies of pleadings to the United States Attorney. will be noted that this applies to all process, not merely that which involves occasions when the employee is engaged in Government activity. The statute was obviously designed to give the United States Attorney in the district in which the state litigation commenced prompt knowledge of all such litigation. United States Attorney is then required to defend any such litigation provided that the employee named in the process is a Government employee and was acting in the scope of his employment at the time of the occurrence from which the action arises. Obviously, the defense to be meaningful must be current with the litigation which is in process.

The procedure established by the statute was obviously designed to provide prompt knowledge to the plaintiff in the proceeding against the Government employee of the involvement of the Federal Government and the necessity for complying with the procedural regulatins of the Federal Government in what to the plaintiff has appeared to be a simple person to person negligent act. In this case we have a situation which the Government knew

of the occurrence of the accident from which litigation arises within a few days of its occurrence. It knew that there must certainly be litigation arising out of it. Yet with this knowledge Francis Hunt, the government's employee, ignored the statute and did not notify the Government of the litigation or deliver the pleadings to it. These pleadings were his possession on or about May 21, 1973.

It now appears that Francis Hunt's superiors had eventual knowledge of the litigation, in some fashion, before Francis Hunt requested their representation. That request was triggered by a call from Merwin Kaye of the Research and Operations Division in the office of the General Counsel. See Exhibit "B" hereto annexed. The Affidavit of William J. Stokes, verified June 30, 1975, does not profess any personal knowledge of the events in question. It is perfectly obvious from the letter of Mr. Theodore Sommer, dated December 9, 1974, that the Government knew of the existence of this claim, and of this lawsuit, some time prior to that date, because a Mr. Merwin Kaye from Washington called the defendant Francis Hunt and asked him to request that the Government defend him. This call was made after the Statute of Limitations which the Government claims is applicable had run and at a time when the Government knew that as it viewed the law, there was no remedy for the plaintiff against either the United States Government or Francis Hunt. The Government's awareness of litigation did not come from the plaintiffs. It had to come

either through Francis Hunt or persons representing him.

Under these circumstances the Government either totally failed to function as contemplated by the Statute or deliberately watched the progress of the litigation in silcence until the case was about to be tried in State Court and their claimed two year Statute of Limitation had expired.

The record now indicates through the letter of Francis Hunt that the representative of the Government investigating this case (continued on page 23) conferred with Mr. Koons of the Travelers Insurance Company, the insurer on the Hunt vehicle, regarding this case, neither before or after the action against Mr. Hunt was begun. When the Travelers Insurance Company accepted the pleadings from Mr. Hunt and undertook to defend him in the State Court it was obligated in Mr. Hunt's interest to provide copies of the pleadings to the Department of Agriculture. This is particularly true since the action against Francis Hunt involved a claim for damages \$140,000.00 in excess of the coverage available to him with the Travelers Insurance Company. Yet the claim apparently is that the insurance company neither notified the Federal Government of the litigation nor turned over to it the pleadings in the action.

Francis Hunt, as a defendant in a State Court action, and the Travelers Insurance Company, by contract, was charged with conducting the defense of the action against him, were required to proceed in the State Court in accord with the practice provisions of that Court. Francis Hunt Answered in the action. He made no Motions to Dismiss the Complaint, setting up no affirmative defense alleging lack of jurisdiction. This pleading was an admission of the jurisdiction of the Court. A Weiver of any affirmative defenses were not made the subject of a Motion under Civil Practice Law & Rules 3211 or set forth in the Answer under

Civil Practice Law & Rules 3013.

Had lack of jurisdiction been pleaded on July 17, 1973 when the Answer and Cross-Claim were served on behalf of the defendant Francis Hunt, the plaintiff had ample time to proceed against the United States Government and to file its administrative claim. Certainly the absence of any affirmative pleading of lack of jurisdiction justified the plaintiff in believing that the action was brought in a proper court and against the proper defendant.

This status of pleadings continued until one month after the date on which the Federal Statute for filing claims allegedly expired. There can be no basis in reason or justice in permitting defaulting defendant and his insurance carrier by such a delay to deprive the plaintiffs both of their remedy against the United States Government and of the remedy against the individual defendant. It is clear that under such circumstances no Amendment of the pleading would be allowed by the Court in view of the extreme prejudice to the plaintiffs arising from the delay and concealment on the part of the defendant.

Again, we call the Court's attention to language of United States Code Title 28, 1346 (b) and 2672, under which the liability of the United States is to be fixed according to the law of the State in which the incident occurred existing at the

-24-

time of the occurrence from which the action erises.

It now appears clearly that the Department of Agriculture knew of this incident from Mr. Hunt's superior, Dr. Rainors, very promptly after the accident occurred. It appears that the accident was investigated by a Mr. Ricks representing the Agriculture Department. It appears that either Mr. Ricks or another government agent conferred with Mr. Koons of the Travelers Insurance Company with respect to the claim. It appears that the Travelers Insurance Company after advising Mr. Hunt of his personal exposure above the amount of his policy failed to raise by any pleading or otherwise defense for lack of jurisdiction in the Courts of New York State.

In summary, it may be said that the agencies of the United States have failed to comply with the provisions of their own Statutes under which they have or may require jurisdiction of an action of this type, while, at the same time, the Government employee himself and his insurance carrier were charged with knowledge of the laws of the State of New York and have knowledge of the possible intervention of the Federal Government, have pursued a policy calculated to deceive and to prejudice plaintiffs. This is one of those rare situations in which the Government it-self may be held to have waived statutory enactments for its

benefit and to be estopped from asserting them. In Massaglia v. C. I. R., 286 Fed. 2nd 258 (10th C. C. A.) at page 262, the Court said:

"The very nature of government operations requires us to apply the principles of estoppel to its conduct with circumspection. See Vestal v. Commissioner, 80 U. S. App. D. C. 624; 152 F. 2nd 132; Guenzel's Estate v. Commissioner, 3 Cir. 258 F. 2nd 248. At the same time we will not allow the government to deal dishonorably or capriciously with its citizens. It must not play an ignoble part or do a shabby thing. See United States v. Heath, 9 Cir. 260 F. 2nd 623."

In <u>United Fruit Company v. United States</u>, 168 F. Supp. 549 (1958), the Court said at page 552:

"Furthermore, as we pointed out in Continental Casualty Co. v. United States, Ct. Cl. 156 F. Supp. 942, if it be held that the admiralty . courts have such jurisdiction, a large part of plaintiff's claim would be barred by the two year statute of limitations applicable to suits under the Suits in Admiralty Act. Plaintiff quite rightly has assumed that its suit could be brought within the six-year period of limitation applicable to suits in this Court. If it now be held that such suits must be brought in the Admiralty Court, then much of plaintiff's claim is barred by the

statute of limitations. In view of the long acquiescence by the government in the bringing of such suits in this court, it cannot now in good conscience assert that such suits must be brought within the two-year period applicable under the Suits in Admiralty Act."

A decision of this Court denying the United States under these circumstances substitution in the place of Francis A. Hunt as the defendant in this action will not violate any of the express directives of the United States Code. It will leave the United States Attorney defending an action brought against Francis A. Hunt as an individual and brought within the appropriate limitation of time. The action may otherwise proceed to trial in the District Court as required by the Statute and the Judgment therein be rendered against the defendant, Francis Hunt, or in his favor. Presumably, if the Government continues the defense of Francis Hunt, it will be required to indemnify him against any Judgment rendered in the District Court. Since the claim is proceeding against Francis Hunt individually, there is no longer a requirement that a claim be filed and the administrative procedures completed pursuant to the Sections of U. S. C. Title 28, Sections 2671-2679. And, of course, there is no defense of the Statute of Limitations. In this way the plaintiffs will not be deprived of a remedy which they have pursued diliglently against the only persons they knew or should have known to have any legal responsibility for the accident and injuries from which this action arises.

### POINT III

IF THE DISCLOSED FACTS ARE NOT CLEAR ENOUGH TO REQUIRE THE DENIAL OF THE MOTION, THE PLAINTIFF SHOULD BE ENTITLED TO EXAMINE THE APPROPRIATE EMPLOYEES AND RECORDS OF THE UNITED STATES DEPARTMENT OF AGRICULTURE. INCLUDING MEMBERS OF THE OFFICE OF THE GENERAL COUNSEL HAVING KNOWLEDGE OF THE FACTS, THE REPRESENTATIVES OF THE TRAVELERS INSURANCE COMPANY. THEIR KNOWLEDGE OF THIS CLAIM AND WHO HAD ANY RELATIONSHIP WITH THE UNITED STATES GOVERNMENT IN REFERENCE TO IT, INCLUDING MR. THEODORE SOMMER, THE ATTORNEY FOR FRANCIS HUNT, UNTIL THE ACTION WAS REMOVED TO THE UNITED STATES DISTRICT COURT.

The factual material now filed in connection with this Motion represents at best a confusion of facts created, it is submitted, by the effort of the representatives of the United States

Government to protect themselves from any responsibility for what has been a gross failure on the part of the Government to function appropriately in this case.

We have Francis Hunt claiming to have told the very seriously injured Mrs. Kelley that he was employed by the United States

Government and she had nothing to worry about. We have him telling his superior, Dr. Rainors, that there was no possibility of any suit and being told to report any developments. In the face of this we have his failure to report the lawsuit, as he claims, for over a period of almost two years, even though he knew he was facing a lawsuit in State Court subjecting him to a possible liability in excess of his insurance of \$140,000.00. It is almost incredible that, faced with such a lawsuit, Mr. Hunt should never have mentioned it to Dr. Rainors or his other superiors. We have the further fact that a representative of the Department of Agriculture talked with Mr. Koons of the Travelers Insurance Company regarding the case so that the Travelers Insurance Company knew that the case involved a Federal employee in the course of his employment. According to Mr. Sommer the attorney for the Travelers Insurance Company assigned to defend Francis Hunt, this information never reached him. The Travelers Insurance Company could escape any liability here if they could hide behind the Federal Statute of Limitations. On the other hand, if the case proceeded against the United States Government, and there was a finding against Francis Hunt, the Travelers Insurance Company would be the primary payor up to the sum of \$10,000.00.

We have the peculiar situation that Mr. Sommer has stated in a letter of December 9 that there came a call from Merwin Kaye of the Federal Government requesting Mr. Hunt to ask defense by the Federal Government. However, we now have his statement that he called the Federal Government on or about December 5 and talked to Mr. Spader and that the request for defense came in this way. However, the Affidavit of Mr. Stokes claims that the first news to the Department came in a latter from Mr. Sommer dated December 9, 1974. Add to this the statement and letter of Dr. Rainors that the request for defense of which he received a copy was dated December 21, 1974.

Add to these inconsistencies the claim of Francis Hunt that he was instructed by Mr. Koons of the Travelers to contact Mr. Sommer, and that in a meeting with Mr. Sommer he again explained his employment; that he was in the course of employment at the time of the accident; that he claims never to have mentioned that the Government should be in the case until it was about to come to trial, and the question of making an offer to Mrs. Kelley came up.

It is respectfully submitted that the plaintiffs should not be deprived of their remedy and without having the privilege of developing fully all of the facts which we believe are concealed rather than illuminated by the material produced by the Government.

#### POINT IV

THE MOTION SHOULD BE DENIED IN ITS ENTIRETY, OR, IN ANY EVENT, SHOULD BE DENIED INSOFAR AS IT SEEKS SUBSTITUTION OF THE UNITED STATES OF AMERICA FOR FRANCIS HUNT AS THE DEFENDANT IN THE ACTION.

Respectfully submitted,

KRAMER, WALES & McAVOY
(Donald W. Kramer, Esq. of Counsel)
Attorneys for Plaintiffs
Office & P. O. Address
59-61 Court Street
Binghamton, New York 13902
(607) 723-6321

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# HINMAN, HOWARD & KATTELL

ATTORNEYS AT LAW

BINGHAMTON, NEW YORK 13901

SECURITY MUTUAL BUILDING AREA CODE 607 723-5341

JAMES L. CHIVERS
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LAWRENCE C. ANDERSON
CLAYTON M. AXTELL, III

December 10, 1974

RECEIVED

EXHIBIT "A"

DEC 1 1 1974

KRAMER, WALES

Brian Wright, Esq. Kramer, Wales & McAvoy 59-61 Court Street Binghamton, New York 13901

Re: Kelley vs. Hunt and Semko

Dear Brian:

.

This letter will confirm my conversation with you of December 9, 1974 concerning the above case. I understand that you have advised the Supreme Court Clerk that the case should be placed on the deferred calendar in view of the Federal Drivers Act requirement that the United States be substituted as defendant for a governmental employee who was driving a vehicle in the course of his employment.

I am enclosing a copy of a letter which I have forwarded to the U.S. Attorney for the Northern District of New York in Syracuse. I have sent copies of that letter to the Area and Regional Offices of the Department of Agriculture and to the General Counsel's Office of the Department of Agriculture in Washington, D.C. Attorney Rufino Saez of the latter office indicated that he thought it may be too late to hold the government responsible if the claim was not presented to an appropriate federal agency within the period of the Statute of Limitations. I cited the Whistler case to him which I gave to you. Nonetheless, I think it may be advisable for you to review the Federal Tort Claims Act procedures set forth in the U.S. Code.

Mr. Hunt received a call from a Mr. Merwin Kaye of the Research & Operations Division of the Office of General Counsel in Washington, D. C. asking him to send a telegram to the government asking the U.S. Government to defend him pursuant to 28 U.S. Code, Sec. 2679. A telegram to that effect was sent yesterday. Brian Wright, Esq. - 2

I believe there will be reasonably quick action taken by the government in this matter.

If I learn anything further, I will keep you advised.

Sincerely yours,

HINMAN, HOWARD & KATTELL

By

N. Theodore Sommer

NTS:jn Encl.

GEORGE L. HINMAN C./ SON KEELER A LAWRENCE ABRAMS CHARLES F. FISH CLAYTON M. AXTELL. JR. EDWARD L. TIRRELL.JR. WARREN M. ANDERSON A FOWARD HILL MARTIN F. HOLLERAN, JR. C. ADDISON KEELER, JR JOSEPH P. MINNICH. JR. JOHN S. DAVIDGE JOHN M. KEELER KEITH E. OSBER RICHARD H. PILLE N. THEODORE SOMMER EUGENE E. PECKHAM JOHN C. FISH

# HINMAN, HOWARD & KATTELL ATTORNEYS AT LAW

BINGHAMTON, NEW YORK 13901

December 9, 1974

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#### EXHIBIT "B"

James M. Sullivan, Esq. U.S. Attorney U.S. Department of Justice Box 1258 Syracuse, New York 13201

Re: Helen D. Kelley and John E. Kelley vs. Francis A. Hunt and Ruth Semko

Dear Sir:

On November 8, 1972 the plaintiff, Helen Kelley, a pedestrian was injured when struck by an automobile driven by Francis A. Hunt, an employee of the U.S. Department of Agriculture. Mr. Hunt and a co-defendant, Ruth Semko, were sued in the New York Supreme Court in Broome County. I am enclosing copies of the pleadings including a complaint, answer, demand for bill of particulars, bill of particulars and the answer and cross-claims of both Mr. Hunt and Ruth Senko.

Mr. Hunt at the time of the accident, was operating his own car with the permission of the federal government while acting within the scope of his employment. It is my understanding that 28 U.S. Code, Section 2679(b) is applicable in this case. That section provides that the sole remedy by a plaintiff against a government employee acting within the scope of his employment and driving a vehicle at the time is a cause of action against the United States. Subdivision (c) of that section also provides that the Attorney General shall defend any civil action or proceeding brought in any state court against any employee of the government or his estate for any such damage or injury.

We have been retained by Travelers Insurance Company, he insurer of Francis A. Hunt, to defend the action. I have been in contact with Attorney David Spader and Attorney Paul Fanfera in the

James M. Sullivan, Esq. - 2 General Counsel's Office of the Department of Agriculture in Harrisburg. They have requested copies of the pleadings which I have forwarded to them as well. I have also forwarded copies to Attorney Rufino Saez in the General Counsel's Office of the Department of Agriculture in Washington, D.C. I have also been in contact with Dr. Rainors in Scranton. Pa. who, Mr. Hunt informed me, is his immediate superior. Dr. Rainors advised me to send copies of the pleadings to the area and regional offices of the Department of Agriculture, which I have done. It is my understanding that the Attorney General should bring necessary proceedings to have the case removed from the State court to the U.S. District Court for the district and division embracing the place where the case is pending. The appropriate district is the Northern District of New York and it is my understanding that you are the U.S. Attorney for said district. I would appreciate your acknowledging the receipt of the enclosed pleadings and advising me of your course of action. Examinations before trial have been held and a complete investigation of the matter has been conducted and I will be happy to provide our full investigatory file upon request. Thank you for your cooperation. Very truly yours, HINMAN, HOWARD & KATTELL Thirle fame By NTS: in N. Theodore Sommer Encls. Rufino Sacz, Esq. cc: Office of General Counsel Department of Agriculture Washington, D.C. 20250 ; 4 Dr. S.S. Farber U.S. Department of Agriculture Meat & Poultry Inspection, Area Office 228 Walnut Street, P.O. Box 875 Harrisburg, Pa. 17108 68

James M. Sullivan, Esq. - 3

cc: Mr. Ned Rice
U.S. Department of Agriculture
Meat & Poultry Division
1421 Cherry Street, 7th Floor
Philadelphia, Pa. 19102

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs.

CIVIL ACTION NO.75-CV-62

-vs-

AFFIDAVIT IN OPPOSITION OF MOTION

FRANCIS A. HUNT and RUTH SEMKO,

Defendants.

STATE OF NEW YORK:

: SS.

COUNTY OF BROOME :

HELEN D. KELLEY and JOHN E. KELLEY, each being duly sworn separately deposes and says:

1. That they are the plaintiffs in the above entitled action against Francis A. Hunt and Ruth Semko. That said action arises out of injuries sustained by the plaintiff, Helen D.

Kelley, sustained personal injuries in an automobile pedestrian accident which occurred on November 8, 1972 in the Town of Binghamton, Broome County, New York and has brought the above entitled action against Francis A. Hunt and Ruth Semko to recover damages for her personal injuries sustained in that accident. The plaintiff, John E. Kelley, brings his action against the same defendants to recover for damages of a derivative nature sustained by the plaintiff, John E. Kelley and for loss of consortium.

- 2. That continuously from the time of the accident involved until after December 9, 1974, your deponents were informed and believed that the defendant, Francis A. Hunt, at the time of the accident set forth in the Complaint was operating his own personal automobile registered in his own name and on his own responsibility.
- 3. That your deponents, through their attorneys, Kramer, Wales & McAvoy, began the action in the Supreme Court of Broome County against the above named defendants and no others because it appeared to your deponents and your deponent's attorneys that the only agencies or persons responsible in any way for said accident were the individual, Francis A. Humt and the individual, Ruth Semko.
- 4. That your deponents, through their attorneys, began their action in Supreme Court, Broome County on or about May 21, 1973 and at that time your deponents had no knowledge or information that Francis A. Hunt was an employee of the Federal Government or that he was or could have been in the course of his employment for the Federal Government at the time of the accident in November 1972.
- 5. That your deponents were totally unaware that they had or might have any claim against the United States Government arising from the accident of November 1972 until they were advised by their attorneys through certain correspondence

between the law firm of Hinman, Howard & Kattell, the attorneys for Francis A. Hunt, in the action in State Court and the United States Attorney's office in Syracuse together with correspondence from Hinman, Howard & Kattell to our attorneys dated December 10, 1974. At that time it was already more than two years since the date of the accident from which this action arises.

6. That at no time had any representatives of the United States Government of Agriculture or any other branch of the United States Government or anyone from the Department of Justice approached either of your deponents in any way with reference to the accident of November 1972 and upon information and belief no one from any agency of the United States Government had communicated with your deponent's attorneys in any way in reference to said accident or to the accident arising therefrom.

of John E. Kelley

Subscribed and sworn to before me this 5th day of

June, 1975.

Notary Public

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs,

CIVIL ACTION NO:75-CV-62

-vs-

FRANCIS A. HUNT and RUTH SEMKO,

Defendants.

AFFIDAVIT

STATE OF NEW YORK:

: SS.

COUNTY OF BROOME :

DONALD W. KRAMER, being duly sworn deposes and says:

- 1. That I am a duly licensed and practicing attorney at law in the State of New York admitted to practice in the Federal Court in the Northern District of New York. I have had personal supervision of the above entitled matter since its inception and am fully acquainted with all of the prior proceedings and facts therein.
- 2. That your deponent's law firm is retained by the plaintiffs above named to represent them in connection with their claim for damages arising from the accident of November 8, 1972, described in the pleadings in the above entitled matter. That preliminary investigation conducted by your deponent's law firm indicated, the plaintiff, Helen D. Kelley, had been struck by

a vehicle operated by one Francis A. Hunt who was driving an automobile owned by him and registered in his name on the public highway in the Town of Binghamton, Broome County, New York at the time of the accident. The investigation also revealed that Mr. Hunt was insured for liability arising out of the operation of the vehicle by the Travelers Insurance Company. It was further indicated that Mr. Hunt was driving towards his home in Binghamton and that that was his destination at the time of the accident.

- 3. After the nature of the injuries of Mrs. Kelley and their permenance became more apparent, your deponent's law firm on May 21, 1973, cause the Summons and Complaint in this action to be served upon Francis A. Hunt and upon Ruth Semko instituting an action in Supreme Court of New York State against these individuals and the Summons and Complaint were properly served upon the defendant, Francis A. Hunt, on or about the 21st day of May, 1973.
- 4. Your deponent has now learned through the attorney for Ruth Semko, Robert C. Powers, that a David J. Ricks, of the Department of Agriculture communicated with Mr. Powers' office on January 24, 1973 requesting to discuss this accident with his client, Ruth Semko with one of the defendants named in the above entitled action and that on January 30, 1973, David J. Ricks, actually interviewed Ruth Semko and took a hand written statement from her in the office of Mr. Powers. Neither your

deponent or any member of his firm was informed of this fact until after the motion herein had been made and on or about the 4th day of June, 1975. At no time did any representative of the Department of Agriculture, including David J. Ricks, ever approach your deponent's law firm in any way or the plaintiffs Helen Kelley and John E. Kelley seeking information from them regarding the accident or informing them of the interest of the United States Covernment in this matter.

- 5. That thereafter the law firm of Hinman, Howard & Kattell, having been retained as your deponents is informed and believes by the Travelers Insurance Company, appeared on behalf of the defendant, Francis A. Hunt, in answering the above entitled action, Robert C. Powers appeared and enswered in the above entitled action on behalf of the defendant, Ruth Semko.
- defendants, a Bill of Particulars was served by your deponent's law firm on behalf of the plaintiffs and Examinations Before Trial were scheduled and held. A Note of Issue was filed placing the case on the Trial Calendar for the Supreme Court of Broome County for the term beginning May 1, 1974. None of these proceedings except the Examinations Before Trial of Francis A. Hunt was any reference made to the employment of the said Francis A. Hunt or to the United States Government or was any

such reference contained in any correspondence or conferences between your deponent's law firm and any of the other parties or counsel in this action.

- 7. Examination Before Trial of Francis A. Hunt was held on the 5th of March, 1974, and in the course of that examination, Mr. Hunt testified in substance that he was employed by the Department of Agriculture and he had been working at Friendsville in the State of Pennsylvania, that he had left work about 4:00 and that the time of the accident was on his way to his residence in Binghamton. Neither in the Examination Before Trial or in any subsequent conferences regarding the case until early in December 1974 was your deponent's law firm informed of any claim that Francis A. Hunt was, at the time of the accident in question, engaged in his employment for the United States Government. This information first came to Brian R. Wright of your deponent's law firm a few days before December 9, 1974, the date of a letter written by Mr. Sommer of the law firm of Hinman, Howard & Kattell to the United States Attorney for the Northern District of New York.
- 8. That although the action against Francis A. Hunt in the Supreme Court of the State of New York was commenced on or about May 12, 1974.
- 9. That a hough the action in the Supreme Court of the State of New York against Francis A. Hunt was begun on or

General's office of the United States who defends such action or to remove such action to the District Court of the United States until February 11, 1975, when a motion for removal of said action to the District Court of the United States with the Northern District Court of New York, was served upon the Clerk of the Supreme Court of the State of New York in Broome County and upon your depinent's law firm. This first action by the United States Government came more than three months after the two year statute of limitations established for claims under the federal tort claims act had expired.

10. That actions instituted by the plaintiffs against Francis A. Hunt in the only Court which would have jurisdiction of that action insofar as the plaintiffs were aware. At that time there remained approximately eighteen months within which the plaintiffs were entitled to administrative claim against the United States Government pursuant to Section 2675, Title 28 U.S. Code Annotated and six months after the denial of that claim, if it were denied within which the plaintiffs might begin a proceeding directly against the United States in the United States District Court, 2401 (b) Title 28 U.S.C.A.

11. The defendant, Francis A. Hunt, would have an obligation if he was acting in the course of his employment at the time of the accident, to deliver the process served upon

him or a copy of it to his immediate superior and said superior was required to immediately furnish copies of the pleadings in process to the United States Attorney for the Northern District of New York, 2679 Title 28 U.S.C.A. The Attorney General was obligated by the same section to certify, if it were a fact, Francis A. Hunt, was in the course of his employment at the time of the accident, and to proceed for the removal of the said action from the State Court to the Federal District Court.

Hunt, his superior in the Federal Government or by the Attorney General, the United States has not complied with the provisions of its own statute under which the remedy is exclusive. If Francis A. Hunt gave the required notice to his superior, and his superior notified the office of the Attorney General reasonably after the commencement of the suit, then, the Attorney General's office has waited over a year and a half the statutory period before filing claims to expire before attempting to remove the case from the Supreme Court of the State of New York and by such delay has deprived both the Federal District Court and the New York State Supreme Court of jurisdiction in the matter. It is submitted that the statute was never intended to have such an effect.

13. This is a situation which the defendant, Francis A. Hunt, was operating his own automobile on his way home to his

residence from an appointment. There were no government indicia of any kind connected with his license or with his car. He and his superiors all knew the precise limits of the terms of his employment. As appears earlier in this affidavit, the government was aware of the accident and had investigated it without giving knowledge to the claimants or their attorneys that the government had any interest in the matter whatever. It is therefore apparent that the United States Government was aware of all of the facts within three months after the accident occurred and made an investigation. The plaintiffs, on the other hand, were without knowledge of the limitations of the employment or the employment itself of Francis A. Hunt. When the action was instituted in the State Court, it became the burden of the government, including Francis A. Hunt, and his superiors and the Attorney General to comply promptly with the plain intent of Section 2679 Title 28 U.S.C.A. by seeking the removal of the case to the United States District Court. That had that duty been fulfilled, the plaintiffs be informed of the extent of the employment of Francis A. Hunt would have had in the excess of one year within which to file their administrative claims against the government and to bring an action against the government after the timely filing of such claim.

14. That the deponent has been unable to learn the nature of any determination of the Attorney General regarding action required of the government employee involved and other government personnel with respect to ensuring knowledge by the government of actions brought against the government employee in State Courts. Your deponent requests that such information be required by the Court to be furnished to the attorneys for the plaintiffs before the decision of this motion.

15. None of the cases dealing with this subject and referred to by the United States Attorney in the moving papers herein are based upon similar fact situations. Your deponent respectfully requests time within which to file a memorandum of law in support of the plaintiffs position.

s/ Donald W. Kramer
Donald W. Kramer

Subscribed and sworn to before me this 5th day of June, 1975.

s/ Nora L. Osterhout Notary Public

Sir: Take notice of an	IN ESEKKKKOKKNIKKKKKKKKKKTHE
of which the within is a copy, duly granted	DISTRICTCOURT
in the within entitled action, on the	NORTHERN DISTRICT of NEW YORK
in the office of the Clerk of the County ofon theday of19	HELEN D. KELLEY and JOHN E. KELLEY, Plaintiffs,
Qated, N. Y.,	FRANCIS A. HUNT and RUTH SEMKO, Defendants.
KRAMER, WALES & MCAVOY Attorneys for	Copy AFFIDAVITS IN
Office and Post Office Address	OPPOSITION OF MOTION
P. O. BOX 1865 BINGHAMTON, N. Y. 13902 TELEPHONE: (607) 723-6321	Attorneys for  Plaintiffs  Office and Post Office Address  59-61 COURT STREET  P. O. BOX 1865  BINGHAMTON, N. Y. 13902  TELEPHONE: (607) 723-6321  Due and personal service of the within  admitted thisday of19
	admitted thisday of19

Attorney

for.

Attorney for .

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs,

No. 75-CV-62

CIVIL ACTION

FRANCIS A. HUNT and RUTH SEMKO,

Defendants.

### REPLY BRIEF IN SUPPORT OF MOTION

### STATEMENT

This brief is made in reply to the plaintiff's brief in opposition to the motion. On June 9, 1975 the United States brought a motion to substitute the United States of America as defendant and to dismiss the action as being barred by Title 28, United States Code, §2675(a) for failure to file an administrative claim before bringing suit.

### FACTS

On November 8, 1972 in Broome County, New York, the plaintiff Helen Kelley, a pedestrian was injured when struck by an automobile driven by Francis A. Hunt, an employee of the United States Department of Agriculture. This action was commenced in Supreme Court, County of Broome, New York on May 21, 1973. An administrative claim was first submitted

to the Department of Agriculture on or about May 1, 1975.

On the day, following the accident, as stated in Mr. Hunt's letter of June 20, 1975, he went to the hospital to express his regrets and told Mrs. Kelley at that time that he worked for the United States Department of Agriculture.

On March 5, 1974, a deposition of Mr. Hunt was taken. ' Those present included Donald Kramer, plaintiff's counsel. Theodore Sommer, attorney for Traveler's Insurance Company and Robert Powers, Attorney for co-defendant Ruth Semko. Mr. Hunt was asked at that time by Mr. Kramer what his occupation was and he replied he was a food inspector. He was then asked, "For the United States Government" and Mr. Hunt replied, "USDA". Plaintiff's counsel was evidently aware of who Mr. Hunt worked for even before he asked the question. Then Mr. Kramer goes on to ask, "Were you working that day?" and Mr. Hunt said, "Yes". Mr. Hunt said that prior to the accident, he was in Friendsville, Pennsylvania and he was then asked, "Were you there in connection with your work"? and the answer was, "Correct". This is unequivocal and unambiguous notice to plaintiff's counsel that the defendant, Francis Hunt was employed by the United States and was within the scope of his employment at the time of the accident.

Further on January 19, 1973 two months after the accident, David Ricks, identified himself as a special agent of the Office of the Inspector General, U.S. Department of Agriculture and took a statement from Mrs. Kelley. She would not sign the statement until she talked with her lawyer but David Ricks did sign the statement and it mentions that before he interviewed

her, he identified who he was and where he worked. So Mrs. Kelley had notice on at least two separate occasions that the defendant was a government employee, once from Mr. Hunt himself and then from Mr. Ricks.

Moreover a medical report and bill for \$3,773.00 from the Binghamton General Hospital was handed to Mr. Ricks by Mr. Kelley when he interviewed Mrs. Kelley on January 19, 1973. Mr. Kelley denies giving these items to Mr. Ricks but admits having copies of the report and bill in his possession in his office in Binghamton. How else would Mr. Ricks obtain the report and bill if Mr. Kelley did not give them to him? The hospital would not give out such information.

### POINT I

THE PLAINTIFF'S ACTION IS BARRED BY THE TWO YEAR STATUTE OF LIMITATIONS UNDER TITLE 28 USC §2401(b).

Plaintiff states that §2401 has no application in cases which have been originally instituted against the employee of the United States rather than against the United States itself. There is no jurisdictional basis for suing an employee of the United States in State Court. Hock v. Carter 242 F. Supp. 863 (S.D.N.Y.1965). There is no rightful remedy in any court against the employee if it has been determined that he was acting within the scope of his employment.

Plaintiff's exclusive and only remedy is a suit against the United States where injury or loss of property results from a federal employee working within the scope of his employment

(26 USC §2679(b)). As such, Plaintiff has two years after the claim accrues to present it in writing to the appropriate federal agency or be forever barred from doing so (28 USC §2401(b)).

Plaintiff quotes from Whistler v. United States, 252 F.
Supp. 913 (N.D. Indiana 1966). That is no longer the law as a result of the 1966 amendment to 28 USC §2675(a). Whistler was based on the prior statute not requiring a prelitigation claim.

Any decision based on Whistler as is Henderson v. United States
429 F. 2nd 588, (U.S. Court of Appeals, 10th 1970 Circuit)
clearly is also no longer good law. Reynaud v. United States
259 F.Supp. 945 1966 (W.D. Miss. 1966) is quoted by plaintiff in his brief and it is cited in Henderson to justify that decision. But ultimately, it is both cases that cite Whistler for authority.

Plaintiff states in his brief that in no case in which an action has been brought in State Court within the two year period has the effect of the dismissal been to terminate litigation because time remained before the expiration of the statute to file a claim. However in Meeker v. U.S., 435 F2nd 1219 (8 Cir. 1970), plaintiff failed to file an administrative claim and his suit was dismissed even though filed within two years of accident. He was left without any other remedy since the two year statute of limitations had run. Exact situation in Bernard v. United States Lines 475 (F 2nd 366 (C.D. Calif. 1969).

There are similar cases in which no time remained to file a claim after dismissal of their suit: Peterson v. United States 428 F 2nd 368, (8 Cir. 1970); Bialowas v. United States, 443 F

2nd 1047, (3rd Cir., 1971); Avril v. United States,
461 F 2nd 1090 (9th Cir. 1972); Gunstream v. United States,
307 F. Supp. 366 (C.D. Calif, 1969). Plaintiff dismisses
them as not involving the Statute of Limitations and says
they simply hold that the filing of an administrative claim
is necessary prior to suing the United States. This is true
but these cases all indirectly show that the law is settled
that a claim must be filed within two years of the accident
because if the plaintiffs in these cases still had time to
file a claim within the two year period, they would not be
appealing the necessity and method of filing a claim prior
to suit.

Finally, it may be said that the statute of limitations is not tolled by the act of suing in state court. If that was the law under Whistler, it is no longer the law since the 1966 amendment mandating a claim before litigation.

(Meeker v. United States). And suit in state court does not dispense with the necessity of filing a claim. Driggers v. United States, 309 F. Supp. 1377 (South Carolina, 1970).

Plaintiff's brief noted that in <u>Hoch v. Carter</u>, the Government's responsibility was apparent from the inception of the accident because of the identity of the vehicle. However the plaintiff was not apprised of the fact that a government vehicle had been involved in the accident until 3 days after the statute of limitation had lapsed. Yet the

Court granted defendant's motion for a summary judgment and said on page 866.

"Remedy against the only party amen able to suit - the United States - was concededly barred as untimely. When the proper party is substituted for the wrong party and the proper party then asserts rights which would have been obviously and concededly available had the proper party been sued originally, plaintiffs cannot be heard to complain."

#### POINT II

THE DOCTRINES OF WAIVER AND ESTOPPEL ARE NOT APPLICABLE TO THE UNITED STATES

In <u>Binn v. United States</u>, 389 F. Supp. 988 (E.D. Wisconsin 1975), plaintiff asserted that the Government's failure to timely forward a standard form in response to a letter constituted an extension or waiver of the two year statute. The Court said on page 991 that "... plaintiff's contention is without merit. The doctrines of waiver and estoppel are not applicable to the Government in this area."

In <u>Claremont Aircraft</u>, <u>Inc. v. United States</u>, 420 F.2d 896 (9th Cir. 1969) plaintiff contended that subsequent oral and written explanations erases or vitiates the previous final denial and therfore the statute of limitations was tolled. The Court said that ordinary principles of estoppel or waiver are not applied to the government.

The two year statute is a jurisdictional requirement and not capable of waiver or estoppel. <u>Powers v. United States</u>, 390 F.2d 602 (9th Cir. 1968): <u>Jackson v. United States</u>, 234 F. Supp. 586 (E.D.S.C., 1964).

In Lomax v. United States, 155 F. Supp. 354 (E.D. Pa. 1957), plaintiff sued the "United States Post Office Department" within the two years and the U.S. Attorney allowed amendment of the complaint to substitute the United States after the two year period lapsed. The plaintiff contended that there was a waiver of the statute of limitations. The defendant's motion to dismiss was granted. The Court said on page 358:

-7-

"As far back as 1887, the Courts have held that the United States is not bound nor estopped by the acts of its officers or agents in entering into agreements contrary to the Congressional enactments."

It went on to say

"A contra holding would subject the United States to suit at the discretion of its officers, thus consenting, in fact, to actions not contemplated by Congress....

And while it may seem harsh to deprive plaintiff of his remedy because of his error in instituting his action against the wrong party, the conditions upon which suit may be brought against the United States have been set forth and it is not within the power of the United States Attorney, nor within the power of this court to make exceptions thereto. The plaintiff's only appeal would be to the legislature. P. 359.

Plaintiff's basis for contending that the Government is subject to estoppel is Mossaglia v. C.I.R., 286 F. 2nd 258 (10th C.C.A. 1961), Guenzel's Estate v. Commissioner, 258 F. 2nd 248 (8th Cir. 1958) and Vestal v. Commissioner, 152 F. 2nd 132 1945). All three cases involve the Commissioner of Internal Revenue and his ability to correct mistakes of law in the imposition and computation of tax liability. United is a States v. Heath 260 F. 2nd 623 (9th Cir. 1958)/criminal case where records of the defendant were turned over to government agents and then lost. These cases are not dispositive since the subject suit arose out of the Federal Tort Claims Act. Suits filed under that statute must be in exact compliance with the terms of congressional consent, otherwise the United States is immune from suit.

## POINT III

THE MOTION SHOULD BE GRANTED SUBSTITUTING THE UNITED STATES AS DEFENDANT HEREIN, DISMISSING THIS ACTION AGAINST THE UNITED STATES OF AMERICA AND FOR SUCH OTHER AND FURTHER RELIEF AS MAY BE JUSTICE

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Federal Building
Syracuse, New York 13201
Telephone No. (315) 473-6660
By: Joseph R. Mathews
Assistant U.S. Attorney

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UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY, :

Plaintiffs :

.

FRANCIS A. HUNT and RUTH SEMKO,

v.

Defendants

MEMORANDUM

Civil Action No. 75-CV-62

# MacMAHON, District Judge\*

The United States of America moves to be substituted as defendant in place of defendant Hunt pursuant to 28 U.S.C. §2679(b). and to dismiss the claim against the United States for plaintiffs' failure to file administrative claims prior to bringing suit as provided in 28 U.S.C. §2675(a).

plaintiff, Helen Kelley, was allegedly injured, while walking along the side of a road in Binghamton, New York, due to the negligence of defendants Hunt and Semko in the operation of their automobiles on November 8, 1972. Defendant Hunt was an employee of the

<sup>\*</sup> Of the United States District Court for the Southern District of New York, sitting by designation.

United States at the time of the accident, but plaintiffs were unaware of that fact: for Hunt was driving his own automobile which bore no indication of his government employment. Plaintiffs commenced an action against Hunt and Semko in May, 1973 in New York Supreme Court, Broome County, seeking damages for personal injuries, medical expenses, and loss of services. Twenty months later, some two years and three months from the time of the accident, the United States certified that Hunt had been acting within the scope of his employment when the accident occurred, and removed the case to the District Court on February 5, 1975 pursuant to 28 U.S.C. §2679(d). Shortly thereafter, plaintiffs filed administrative claims with the appropriate federal agencies, which were denied as time barred because they had not been presented within two years from the time when the claims accrued. 28 U.S.C. §2401(b).

The motion to substitute must be granted. It is clear from the applicable statutes, 28 U.S.C. §§1346(b) and 2679(b), that plaintiffs' sole and exclusive remedy is against the United States and not against the individual employee. Garrett v. Jeffcoat, 483 F.2d 590 (4th Cir., 1973); Perez v. United States, 218 F. Supp. 571 (S.D.N.Y. 1963).

Plaintiffs contend that the motion to dismiss should be denied in the interest of judicial economy. They assert that the general statute of limitations of two years for suits against the Government, contained in 28 U.S.C. §2401, does not apply where an action was commenced against the individual employee in state courts since 28 U.S.C. §1346(2)(b) states that the United States, under the Federal Tort Claims Act (28 U.S.C. §§2671-2680), is liable "in the same manner and to the same extent as a private individual under like circumstances." Since Hunt, as a private individual, would be liable under a three year statute of limitations in New York (Civil Practice Law and Rules §214), it is asserted that plaintiffs did not have to file administrative claims within two years of the accident. They claim that even if this suit is dismissed, they could bring another action against the United States until November 8, 1975, or three years from the accident, since they have now filed administrative claims. Therefore, to avoid a needless duplication of effort, plaintiffs ask that we deny this motion to dismiss their claim against the Government.

The United States contends that a dismissal is mandated because plaintiffs did not file the requisite administrative claims prior to the bringing of their

suit under 28 U.S.C. §2675(a).

Plaintiffs' assertion that the New York three year statute of limitations applies to this case is incorrect. Section 1346 (2)(b) of Title 28, United States Code, on which plaintiffs rely, is expressly subject to the provisions of the Tort Claims Act. And §2675 of the Act, which requires the filing of administrative claims, was amended in the same bill which amended §2401 (Pub. L 89-506, 80 Stat. 306) to limit the time for submitting claims to two years from accrual. The legislative history of this bill indicates that §2401 was amended to conform with the requirements of the Tort Claims Act. Therefore, the New York three year statute of limitations has no application to plaintiffs' claim against the Government.

However, we are not convinced that the United States is entitled to a dismissal. It is clear, from the legislative history, that the Federal Tort Claims Act has the purpose "of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government, S. Rept. No. 1327, 89th Cong. 2d Sess., 1966 U.S. Code Cong. & Admin. News p. 2515.

In light of this enlightened policy, a dismissal would result in an injustice. Plaintiffs would be forever barred from asserting this claim for relief because they failed to file administrative claims within two years of the accident. However, this failure was not the fault of the plaintiffs, as they had no indication that Hunt was a government employee acting within the scope of his employment, but the fault of Hunt or his superiors for failing to follow the prescriptions of 28 U.S.C. §2679(c).

It appears that plaintiffs have at all times diligently prosecuted this suit. There was no delay in the bringing of the action in state court against the only persons who, to the best of plaintiffs' knowledge, might bear legal responsibility. Plaintiffs were not informed during the twenty months this suit was pending in the New York court that the United States, and not Hunt, was the proper party defendant. Hunt was under a statutory duty to report this suit to his superiors (28 U.S.C. §2679(c)), and the Government was under a duty to investigate the matter and promptly certify that Hunt was acting within the scope of his employment. Any undue delay in this process cannot operate to the benefit of the Government and to the prejudice of the plaintiffs. Surely the Government by its own inexcusable delay, if not sharp

practice, should not be permitted to lull the plaintiff into a false sense of security by waiting for the time to expire for the filing of an administrative claim before moving to be substituted as a defendant in the state action, removing it to a federal court and then moving to dismiss.

The cases cited by the United States in support of this motion are inapplicable for in those cases, there was either delay in certification which still left sufficient time for the filing of administrative claims (See, e.g., Hoch v. Carter, 242 F. Supp. 863 (S.D.N.Y., 1965); Driggers v. United States, 309 F. Supp. 1377 (D.So.Car., 1970); Gustafson v. Peck, 216 F. Supp. 370 (N.D. Iowa, 1963)), or the suit was deliberately brought against the individual employee to avoid the running of the statute of limitations or the need to file administrative claims (See, e.g., Meeker v. United States, 435 F.2d 1219 (8th Cir., 1970); Peterson v. United States, 428 F.2d 368 (8th Cir., 1970)). Two other cited cases (Bialowas v. United States, 443 F.2d 1047 (3d Cir., 1971), and Avril v. United States, 461 F.2d 1090 (9th Cir., 1972)) deal with a situation where plaintiffs were aware that their claims were against the Government, but filed incomplete administrative claim forms prior to bringing suit. The Government fails to cite, and we have failed to find in our own research, a single case holding that a plaintiff, who acted in good faith in

bringing suit against a government employee, might lose his remedy due to a protracted, and perhaps a calculated, delay by the United States in fulfilling its obligations under the Tort Claims Act.

While it is true that the United States is immune from suit except to the extent that it has waived immunity, and that it may impose conditions for bringing actions against it, we do not believe that the Government may manipulate the conditions to deny plaintiffs their day in Court to seek redress for their injuries.

The procedure set out in the Tort Claims Act is "to provide a method for the assumption by the Federal Government of responsibility for claims for damages

The procedure set out in the Tort Claims Act is "to provide a method for the assumption by the Federal Government of responsibility for claims for damages against its employees arising from the operation by them of vehicles in the scope of their Government employment."

S. Rept. No. 736, 87th Cong. 1st Sess., 1961 U.S. Code Cong. and Admin. News p. 2785. A dismissal here would result in a method for the avoidance of the very responsibility which the United States has consented to assume.

Accordingly, the motion to substitute is granted and the United States shall come into this action in defendant Hunt's place and stead.

The motion to dismiss the claim is denied.

Certification for Immediate Appeal

We believe that the above decision and order presents a controlling question of law as to whether on the undisputed facts this action is time barred by plaintiff's failure to file an administrative claim within two years of the accident. There is substantial ground for difference of opinion and an immediate appeal from our decision and order may materially advance the ultimate termination of this litigation. Accordingly we hereby certify the case for immediate appeal under 28 U.S.C. \$1292(b) and hereby stay all further proceedings in this action pending determination of an appeal or denial of permission to appeal from our order by the Court of Appeals.

So ordered.

Dated: Syracuse, N.Y.

September 18, 1975

LLOYD F. MacMAHON

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY,

JUDGMENT

50%

Plaintiffs, --

VS.

Civil Action No. 75-CV-62

UNITED STATES OF AMERICA and RUTH SEMKO,

Defendants.

This action came on for trial before the Hon. Edmund Port, District Judge, Presiding, and the issues having been duly tried and a decision having been duly-rendered in favor of the plaintiffs upon the causes of action alleged in the complaint against the defendants, in the sum of \$65,000.00, with interest the date hereof, and having further rendered a decision apportioning the damages among the defendants in the following manner:

Defendant, United States of America

Defendant, Ruth Semko 50%;

and the costs, having been duly taxed at \$225.62:

NOW, on motion of Kramer, Wales & McAvoy, attorneys for the plaintiffs, it is

ORDERED AND ADJUDGED that the plaintiff, Helen D. Kelley, recover from the defendants the sum of Fifty Thousand Dollars (\$50,000.00), and the plaintiff, John E. Kelley, recover from

the defendants the sum of Fifteen Thousand Dollars (\$15,000.00) with interest in each case at the rate of % as provided by law from the date hereof, together with the costs of this action, and it is further

ORDERED AND ADJUDGED that the defendants, and each of them, shall be entitled to a judgment against the other upon payment to the plaintiffs, upon the judgment, of such amount as shall exceed such defendant's proportional share of the judgment in favor of the plaintiffs, and that such defendant shall be entitled to execution for such excess so paid.

Dated and entered Utica, New York
JULY 1976

Clerk of the Court

United States District Court 77-0513
FOR THE
Northern District of New York

HELEN D. KELLEY and JOHN E. KELLEY

UNITED STATES OF AMERICA and RUTH SEMKO

There was entered on the docket

Civil Action No. 75-CV-62

July 22 , 1976

an order&(judgment) against the defendants & in favor of the plaintiffs in the sum of \$50,000.00 and \$15,000.00 respectively w/int.at 6% from 7/22/76 and costs in the amount of \$225.62.

J.R. SCULLY , CLERK



UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HELEN D. KELLEY and JOHN E. KELLEY,

Plaintiffs

vs.

UNITED STATES OF AMERICA and RUTH SEMKO,

Defendants.

CIVIL ACTION NO.

75-CV-62

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the July 22, 1975 Order of Honorable Edmund Port adjudging in favor of Helen D. Kelley and John E. Kelley, and against the United States in the amount of \$50,000 and \$15,000 respectively with interest at six percent and with costs.

Dated: September 17, 1976
Syracuse, New York

JAMES M. SULLIVAN, JR.
United States Attorney
Northern District of New York
Federal Building
Post Office Box 1258
Syracuse, New York 13201

By: Joseph R. Mathews
Assistant U.S. Attorney